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Legal dogmatic and academic education

Struiksma, J.

published in

Recht en methode in onderzoek en onderwijs
2013

document version

Publisher's PDF, also known as Version of record

[Link to publication in VU Research Portal](#)

citation for published version (APA)

Struiksma, J. (2013). Legal dogmatic and academic education. *Recht en methode in onderzoek en onderwijs*, 2013(2), 24-36.

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Inhoudsopgave

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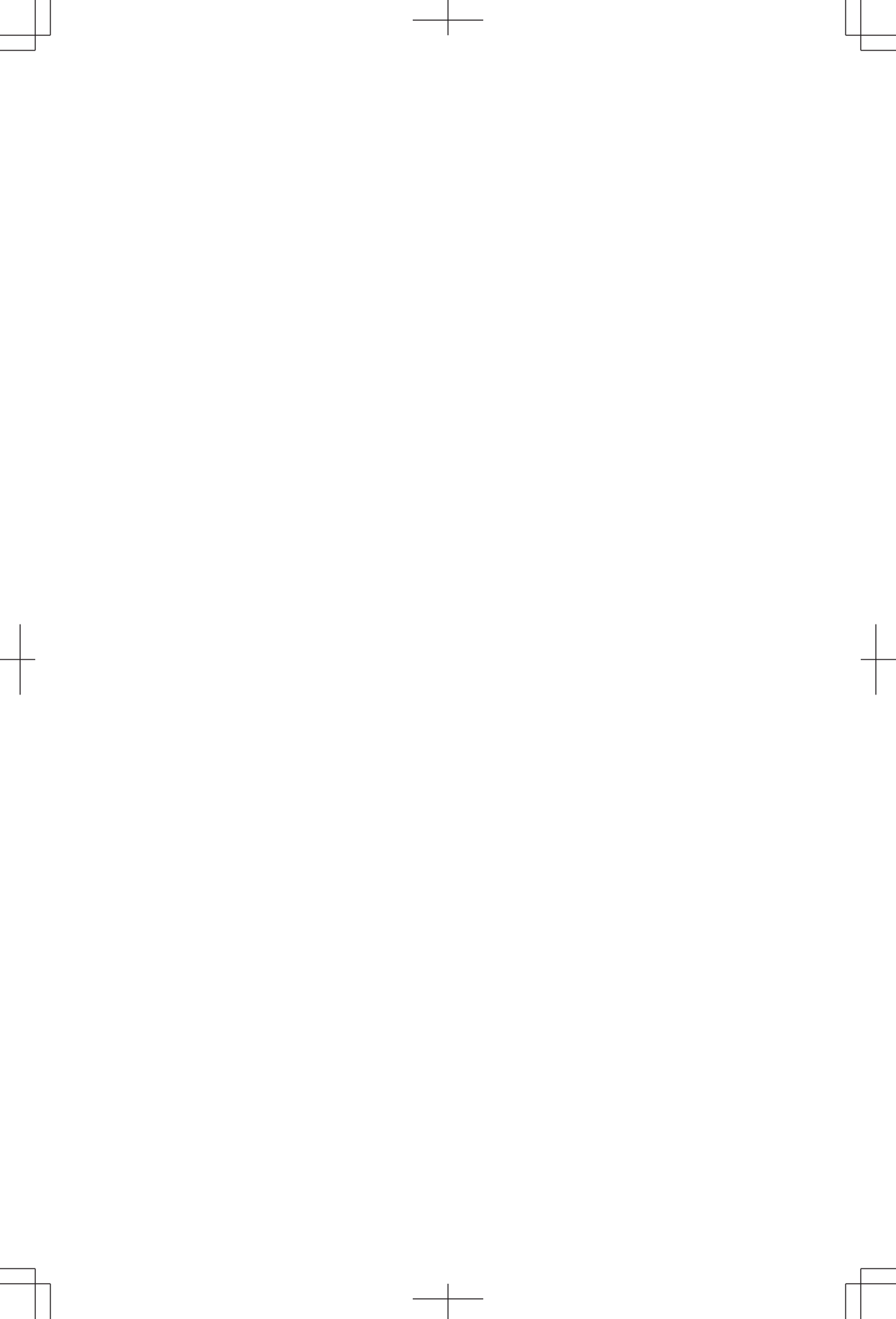
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EDITORIAL

Academic Learning

Asking Questions and Judging Answers

Lisanne Groen

Two years ago, I was teaching an introductory course in administrative law to first-year law students. One of the topics to be discussed was that of the ‘interested party’: when one wants to challenge a government decision in court, one has to qualify as an ‘interested party’. In order to qualify, different requirements must be taken into account, which derive mainly from case law.

In preparation for the class, all students had to write an assignment about this subject. I asked one of them how she had approached this specific question and what she thought would be a possible solution. She went over the requirements and argued that the applicant in the assignment could not qualify as an interested party. I complimented her on her answer and asked if anyone had found a different solution. Initially, nobody responded, but after some consideration one of the boys raised his hand hesitantly. He stated that he too had gone over the different requirements, but had decided the applicant could indeed qualify as an interested party, and he explained his decision in great detail. When I complimented him as well, the first student became confused: ‘I thought you said my answer was correct, did I misunderstand you?’ I said that both of the students had given a suitable answer to the question. ‘So... then it’s not a very good question, is it?’ she responded. For the record: she was not being ironic.

During law school, students have to explore different theories of jurisprudence. They read about Montesquieu’s judge, who is nothing more than a ‘bouche de la loi’; they study Dworkin’s ‘right answer thesis’; they read Hart, who claims that Dworkin is a ‘noble dreamer’ and, if they’re lucky, they learn from Posner how judges think and from Kennedy that judges always have political agendas. They also learn that none of these theories is entirely true (or false). At present, students are not generally taught how theories can be put into practice – that is, how they can be useful in solving legal problems. In most academic curricula roughly two types of courses are taught: on the one hand, courses that focus on positive law (students have to solve a case by means of standing law); on the other hand, courses that focus on legal theories (legal philosophy, ethics, theory of jurisprudence, and so on). The two types are hardly ever combined, which may give students the idea that they are unrelated. The question about the ‘interested party’ in my class was a matter of positive law and therefore only one answer could be correct: the answer in accordance with standing law.

In my opinion, the student's observation concerns one of the most fundamental issues we have to teach law students: there are always several answers to legal questions. This may confuse them (especially first-year students, because they're not familiar with legal language yet), but it is an essential insight to acquire in order to become a good lawyer. However, the fact that legal issues can be resolved in different ways does not mean that all these solutions are equally suitable. It is therefore particularly important that students learn to distinguish a 'good solution' from a 'possible solution'.

But how do we do that? This issue is all about academic learning and contains several suggestions to optimize legal education in addition to useful insights in academic teaching.

While Struiksma creates a theory of dogmatic academic education as such, Van Klink and De Vries, Sokhi-Bulley, Hutchinson and Schwöbel-Patel, in short, focus on what students need to know – and how they should be taught that knowledge – to become good lawyers.

Struiksma investigates how the evolution of the application of mundane knowledge to theory design is 'emulated' in legal dogmatic education. On the basis of the 'empirical cycle' of De Groot, he distinguishes six steps by which theory development takes place: initiation by practical applications; deepening by practical application; recognition of theory design; initiation into theory design; deepening of theory design and independent theory design. Students must become aware of this theory and its development, so they can eventually improve it. That is why the different steps of the empirical cycle should be made more visible in the legal curriculum.

Van Klink and De Vries state that it is important for law students to develop a critical attitude. They introduce the idea of 'skeptical legal education', based, in part, on Oakeshott's understanding of liberal learning. Students have to judge the information they receive, and to optimize the conditions for them to be able to do so, Van Klink and De Vries identify a number of preconditions: student participation has to be emphasized in legal courses, teachers should make clear on the basis of which values they are reasoning, and present a variety of opinions, so that students will discover that legal science is a matter of debate. The result will be an interesting learning experiment that is also suitable for first-year students.

Sokhi-Bulley also stresses the importance of a critical attitude. She links this attitude to 'curiosity' and 'self-reflection', and suggests a 'toolbox of skills' that academic teachers can use to teach their students how to be critical, while instructing them in different theories that are part of that toolbox. Methodology is thus interpreted as a way of thinking (an attitude) that always influences the way in which a specific case is approached. Sokhi-Bulley also describes a learning experiment: she asked her students to write an assignment about the same case from different perspectives, for example from a legal positivist, a feminine and a Foucauldian point of view.

Hutchinson argues that it is important for lawyers to know how facts are established in the social sciences. Since the assessment of facts is important in interpreting and developing law, lawyers need to be trained in analysing data. This training will result in well-founded legislation and jurisprudence and can be of use in interdisciplinary research groups.

Finally, Schwöbel-Patel describes the course of events during a teaching workshop where she and her colleagues were discussing the possibilities of teaching law in a critical fashion, and the academic restraints in doing so. She gives a rough sketch of these restraints: universities are viewed as enterprises, students as their consumers, and education has to be 'sold' as a financial investment in the student's future. Referring to Kennedy, she emphasizes the dangers of this development and advocates a different, wider understanding of education, which she refers to as *Bildung*.

The student who got confused two years ago eventually began participating in the discussions in class, a bit wary at first, but gradually more enthusiastically. When I asked her how that enthusiasm had developed, she answered: 'I'm no longer afraid that I'm saying something stupid when I disagree with the others. I've become more confident, not only as a student but also... as a person, I guess.'

Now that's what we need.

ARTIKELEN

Skeptical Legal Education

How to Develop a Critical Attitude?

Bart van Klink & Bald de Vries

1 The age of critique

If one were to ask law teachers nowadays what distinguishes academic legal education from professional and vocational training, they probably will refer to the capacity of critical thinking. As law teachers at the university we want students to develop a critical attitude. But what exactly does it mean to be critical and why is it important to be critical? How can a critical attitude be promoted and developed? In legal theory the notion of critical thinking seems to be annexed by followers of the Critical Legal Studies movement.¹ By wearing the banner of 'critical', 'crits' such as Duncan Kennedy, Allan Hunt and Peter Goodrich, suggest that they have acquired the monopoly of being critical; other, mainstream liberal or conservative approaches have to be dismissed as hopelessly uncritical. 'Critical' in this understanding is connected to a left-wing political agenda that aims at exposing *and* subverting existing power structures in society. This is certainly one way of being critical, but the notion of critique is a distinctively modern notion that contains other possibilities of being critical as well.

The notion of critique lies at the core of our modern self-understanding that originated in the Enlightenment. Kant (2003, p. 54) defined Enlightenment famously as 'man's emergence from his self-incurred immaturity' or, more properly, 'speechlessness' (*Unmündigkeit*). In the *Critiques* that he developed he sought to liberate thinking by means of reason from the *idées reçues* handed down by tradition.² As Bauman (1993, p. 6-7) argues, in a similar vein, enlightenment involves the possibility of emancipation and liberation. It empowers the individual to liberate herself from a heteronomous social order. Critical education contributes to the subject's emancipation and autonomy. Traditionally, the university is regarded as the central place where critical learning is taught and encouraged.

As we hope to demonstrate below, there are other and less politicized and biased ways in which critical thinking can be understood and promoted in legal education that do more credit to the academic ideal of generating knowledge and

1 For an introduction to the 'first wave' of Critical Legal Studies, see Kelman 1987.

2 Bauman (1993, p. 8) suggests that this contradiction establishes 'an aporetic situation' – the contradiction between autonomous rational individuals (being able to choose between wrong and right) and heteronomous rational management to prevent people choosing 'wrong'. Skeptical legal education, it is suggested here, takes issue with this aporetic situation.

insight. As we will explain below, reflexivity plays an important role in our understanding of critical thinking. Reflexivity not only refers to one's own learning process but also to the social context of modernity in which learning takes places, as described by social scholars such as Beck, Giddens & Lasch (1994).

In this article we intend to elucidate the role that critical thinking may play in legal education, building on Oakeshott's notion of liberal learning.³ Michael Oakeshott belongs to the tradition of secular humanism that aims at initiating students in a 'great conversation' which shapes them intellectually as well as morally (Kronman 2007, p. 86-87). In *The Voice of Liberal Learning* (a collection of essays published in 2001), Oakeshott characterizes learning as a strictly non-instrumental activity. In schools and universities, knowledge is acquired for its own sake. First, we will clarify Oakeshott's notion of liberal learning (section 2). Second, we will introduce the idea of *skeptical legal education*, which is to a large extent based on Oakeshott's understanding of liberal learning but which relativizes its insistence on the non-instrumentality of learning and reinforces its critical potential (section 3). In addition, we will discuss the role that reflexivity plays in skeptical legal education. Thirdly, an example of skeptical legal education in the study of law will be presented (section 4). Finally, building on this example, we will show the relevance of the suspension of judgment that skeptical legal education requires, for legal practice (section 5).

2 The art of conversation

According to Oakeshott (2001, p. 10), the human world is essentially a 'place of learning'. As an *animal rationale* man is involved in an on-going process of attributing meaning to the world around him. By doing so, he creates a human world, not because this world solely consists of human beings and all the things that they produce, but primarily because it is a product of the human activity of signifying. Learning involves an unlimited *semiosis*: every attribution of meaning to the world by man is temporary and incomplete. Learning does not follow a pre-established plan and has no final destination. It is an adventure with an uncertain and unpredictable outcome:

'This engagement is an adventure in a precise sense. It has no preordained course to follow: with every thought and action a human being lets go a mooring and puts out to sea a self-chosen but largely unforeseen course' (Oakeshott 2001, p. 11).

Throughout his whole life man is engaged in learning. Within this *education permanente* schools and universities occupy a privileged position. Characteristic for these educational organizations is, to begin with, that those involved are recogni-

3 This article is a sequel to Van Klink (2013) in which a liberal and a critical view on education, as presented by Oakeshott and Kennedy respectively, are compared more extensively. Some parts of the current article are derived from this earlier article.

zed and recognize themselves as *learners*, besides possible other roles they may fulfil in society (such as musician, major or 'meter maid'). Subsequently, learning in educational organizations is focused on the learning of *something specific*. It does not aim at promoting intellectual development, spiritual growth or the broadening of one's horizon in general (these may be possible side effects), but at acquiring knowledge about a particular subject, within a particular discipline, with the help of the methods and conceptual tools typical for the discipline at hand. The learner has to conceive of learning as a specific task, which requires attention, patience and persistence. Finally, in schools and universities learning is not an instrumental activity, but *a goal in itself*. Knowledge is acquired not only, or not predominantly, for external purposes. Learning is an adventure, because the route to follow and the destiny are always uncertain and may change in the process of acquiring knowledge. It takes place in a separated sphere, far away from our daily cares and concerns. Therefore, Oakeshott (2001, p. 15) characterizes learning as liberal, not in the political sense but in the existential sense of 'liberated' or 'freed': at least for a couple of years, learners do not have to worry too much about 'satisfying contingent wants'. What the university offers, is 'the gift of an interval' (p. 114).

Oakeshott (2001, p. 69) describes education as a transaction between generations, which aims at introducing newcomers to an 'intellectual, imaginative, moral and emotional inheritance'. The inheritance is shaped and reshaped in an on-going conversation in which people are engaged in understanding themselves and their world. In order to be able to participate in this conversation, learners have to learn first to speak the language and to then recognize the different voices that can be discerned within this language. Every academic discipline constitutes a language of its own, with its own rules, by means of which certain aspects of the world and human existence can be expressed. It is the task of the teacher to teach the students the rules of the language and to show how one can make one's own contribution to the on-going conversation. Liberal learning is an initiation in this art of conversation.

According to Oakeshott, the 'free' conversation that takes place at universities was threatened by various developments within the British educational system in the 50s and 60s of the last century and modern society in general. Increasingly, learning is transformed into some form of *applied education*. That means that education is used for socializing students and preparing them for certain tasks in society. Instrumental learning replaces liberal learning and, as a consequence, teaching is reduced to the training of a series of technical functions for the sake of some social purpose instead of knowledge acquisition for its own sake (cf. Oakeshott 2001, p. 13). Nowadays, education is subjected increasingly to the logic of economic reason as universities apply business models, based on output, efficiency and economic utility as benchmarks of quality (see Francot & De Vries 2010). Due to these developments, schools and universities are no longer free spaces of learning, where learners acquire knowledge mainly for its own sake.

In modern universities there is an increasing tendency to reduce learning to skills training. Oakeshott argues that education never coincides with the training of specific techniques, not even in vocational education. In order to know *how* to do something, one has to understand first *what* one is doing. In Oakeshott's view, knowledge contains two components: information and judgment. Information consists of both facts (for instance about what statutes are and where they can be found) and rules that prescribe how a specific skill (such as the interpretation of a certain statute) has to be carried out. Judgment is the knowledge that makes it possible to interpret information and to assess its relevance and, moreover, to determine which rule has to be applied in a given case and which actions are required by this rule. Without knowledge of this kind one would not be able to learn a skill: 'Before any concrete skill or ability can appear, information must be partnered by "judgment," "knowing *how*" must be added to the "knowing *what*" of information' (Oakeshott 2001, p. 49). A lawyer, for instance, needs to know more than the content of the legal norms; s/he also must know when in a given case which norm s/he has to apply and how that norm has to be interpreted in the case at hand. This kind of knowledge cannot be expressed in rules or, in other words, be translated into information. It gives us guidance in situations where there are no specific rules or methods available or where we do not know which rule or method to apply. Generally speaking, when we learn a language – whether it is English or Spanish or the language of philosophy or the law's language – it does not suffice to learn the rules only. A competent speaker is someone who is able to express himself or herself in a way that is not prescribed explicitly by the rules. Judgment cannot be taught as such, because it cannot be made an independent object of study.⁴ The teacher transmits it implicitly when giving information: 'It is implanted unobtrusively in the manner in which information is conveyed, in a tone of voice, in the gesture which accompanies instruction, in aside and oblique utterances, and by example' (Oakeshott 2001, p. 60). Students develop their faculty of judgment by recognizing and appreciating the individual intelligence at work in the way in which the teacher thinks and speaks, in his or her personal style and mode of expression.

In the past, nobody gave lessons in the art of conversation, but it had to be learnt by listening to competent speakers engaged in conversation. There are no shortcuts for learning by way of simple techniques or 'easy methods' (Oakeshott 2001, p. 179). Only by 'submerging' oneself in the practice of scholarship one can become a fully-fledged participant in this practice.

3 Skeptical legal education

Following Oakeshott, we conceive of education an initiation in the art of conversation in which scholars of a certain discipline are engaged. This does not imply that students have to be trained to be their master's voice; on the contrary, they

4 Kronman (1993, p. 53ff) expresses a similar idea when he describes the lawyer as a lawyer-statesman who possesses of 'practical wisdom'.

have to develop their own voice. For that purpose, it is important to encourage students to reflect critically and to develop their faculty of judgment. Being critical is not the same as understanding society according to some pre-established political scheme, as 'crits' like Duncan Kennedy assume. Critical thinking as promoted by Kennedy and others is *one* way of being critical, because it can make students aware of power structures in education and society at large. However, academic education is not a preparation for political activism. (In their private lives, students may of course choose to do so.) Academic education teaches students not to embrace any kind of political ideology (either of a conservative or a progressive strand), but instead to question and debunk it.⁵ The 'critical' approach to law advocated by Kennedy and others runs the risk of becoming in itself dogmatic and not open to self-criticism.

However, what CLS rightfully point to is the contingent and contestable nature of law: the question what law is (as a social construct), how it has to be founded and how it is used in society, is not self-evident but open for critique and amendment. Skeptical legal education is *reflexive* in the sense that it questions current assumptions about what law is, how it functions in society and what or whose purposes it serves. Reflexivity means that modern law calls for an understanding of modern society and the processes of modernization that shape society. It refers to the task of understanding processes of modernization, such as individualization, globalization, industrialization and secularization, in order to understand their implications for the structure of contemporary society and its foundations, in particular in politics and law (cf. Beck, Giddens & Lash 1994). Applied to legal education, reflexivity asks for a skeptical attitude towards both the law and its foundations such as the rule of law, causality, responsibility and so on, in order to find out whether these foundations have to be reconsidered in the context of contemporary society (De Vries 2013). In short: a reflexive approach aims at laying bare the seemingly self-evident assumptions of (any) authoritative interpretation of law and presupposes an intellectual position towards the study of law rather than a particular political position as advocated by, for example, CLS. It exists in a constant questioning of current assumptions about law, for the benefit of both our knowledge of the law and its foundations and the intellectual development of the student. In this sense, skeptical legal education differs from the positions taken by Kronman (2007) and, more recently, by Nussbaum (2010). Kronman defends an entirely non-instrumental view on education, in which learning contributes to self-understanding through the study of canonical texts.⁶ Nussbaum, on the contrary, conceives of education as a tool for reinforcing citizenship with democracy as a key notion (though not very well developed). Skeptical legal education serves no immediate political purposes nor is it part of an existentialist quest for the meaning of life.

What matters is, that students learn to make their own assessment of the information that they receive from teachers while reading literature, listening to lectu-

5 For a detailed critique on Kennedy's view on critical legal education, see Van Klink 2013, p. #.

6 See, e.g., Kronman 2007, p. 261 (Appendix).

res and engage in discussion. Students cannot and do not invent the standards of evaluation from nowhere, but they have to build hermeneutically and critically on the values that are already accepted within the community of legal scholars. In this sense, it is critical towards the 'enlightened' notion of critique, developed by Kant and others, where critique is seen as liberation from tradition and traditional prejudices (see section 1). Whereas Carrington (2004, p. 149) conceives of 'moral and intellectual autonomy' as the ultimate goal of education, we would prefer to speak of the moral and intellectual *integrity* to use one's 'own' faculty of judgment. The student's autonomy is always related and relative to the intellectual environment in which s/he is raised. So it is a critical attitude that has to be developed starting from an 'uncritical' (or self-evident) background of shared opinions and beliefs. This different sense of being critical is what we intend to capture in our notion of skeptical legal education: knowledge claims should never be taken for granted, but questioned and discussed from within the context of accepted ideas handed down through particular academic traditions of thought. The general aim of education is not to raise political awareness but intellectual awareness: to feed epistemological doubt and uncertainty so that students learn to assess knowledge claims critically. Hence, learning involves the responsibility to reflect upon the knowledge gained – on its foundations and the social and political purposes it may serve. To reflect, for example, upon the question: What kind of lawyer do I want to be? The answer to this question cannot be taught but only learned – in an autonomous education setting in which learning for its own sake is emphasized.

For the development of judgment in the context of legal education in particular three conditions have to be met. These conditions which we will discuss below concern (1) the student's activity in and outside the classroom, (2) the manner in which the teacher transfers knowledge and (3) the institutional context of the faculty management respectively. We have derived them to a large extent from Oakeshott's notion of liberal learning as described above, but we have modified them in some respects in order to make the learning process more (or more explicitly) critical, more engaging and less 'inward oriented'.⁷

To begin with, legal education should give more room for student participation in courses. According to Oakeshott, students have to learn the language of a specific discipline, so that one day they are able to generate new utterances in this language. However, Oakeshott adopts a rather hierarchical model of learning in which the teacher transfers knowledge to the students. We suggest modifying this model and adding more horizontal and interactive elements to it. In our view, it is essential that students participate more actively in class than Oakeshott acknowledges. One may learn a lot from reading texts and listening to competent speakers, but in order to master a language fully, one must be given regularly the opportunity to speak for oneself. This may be accomplished by means of group discussions, presentations, moot courts and so on, and solely in classes of

7 These modifications follow from the imaginary encounter between the liberal and 'critical' view on education, as described by Van Klink 2013, p. #.

limited size. The cases discussed in law courses should give a representative overview of the law as it is understood in legal doctrine and should encourage students to make their own assessment of it (without ‘politicizing’ the classroom as advocated by Kennedy (1995 and 2004)). Furthermore, students should be encouraged to continue their learning process outside the classroom through various kinds of study-related extracurricular activities such as reading clubs, online blogs, and student seminars. Teachers can stimulate this by facilitating reading clubs, giving book suggestions or possibly by organizing such reading clubs themselves. The ‘Law & Lounge’ experiment described below is an example of the ‘horizontalization’ of learning. Moreover, students can get involved in online activity, start discussions on relevant topics, and so on. As the university is a community of both students and teachers, interaction does not need to stop at the official class hours. Additionally, the faculty could invest in these extracurricular student-teachers activities by providing financial support and other facilities.

What is required, subsequently, is that law teachers convey information from a detached point of view. That is, they should present the law as it is, as much as possible independently from their own ethical and political preferences.⁸ This descriptive, seemingly ‘neutral’ account of the law does not presuppose that understanding law is in itself a neutral or value-free activity. On the contrary, law teachers are required to present the law as it is and to expose the legal, moral and political values on which the law (and their understanding of it) is based, however without identifying themselves with these values. If they evaluate the current law and give recommendations to amend it, they have to make clear that they are not describing the law as it is at a certain moment in time but are expressing their personal opinion about how the law ought to be in the future. Value judgments are controversial in science, because their validity depends on the acceptance of certain values and ultimately of a worldview (or an ideology in ‘critical’ terms) whose truth can never be established by scientific means (cf. Weber 1989, p. 25-26). So when teachers are evaluating the law, they should make clear on the basis of which values they are reasoning, how they understand these values in the given situation, and how their evaluation is connected to their general worldview. In this respect a CLS approach may be useful as it helps to reveal moral and political choices that are involved in making law and teaching law, which traditional legal education tend to ignore. However, political education should not amount to political activism.⁹ As Max Weber (1989, p. 19) puts it: ‘politics has no place in the lecture-room’. Instead he recommends that teachers offer examples of hypothetical reasoning: if one accepts a specific value (for instance, democracy), one has to acknowledge certain rights as well (such as the freedom of speech), without committing themselves (nor the students) to the acceptance of this value (p. 25-26). Reasoning in such a way gives students the opportunity to arrive at a

8 This requires what Raz (1979, p. 158) calls ‘non-committed detached statements’: ‘Since one may know what the law is without knowing if it is justified, there must be a possibility of making legal statements not involving commitment to its justification.’

9 A powerful contemporary defence of this position can be found in Fish 2008.

different assessment, building on different values, on a different understanding of the same values, or on a different worldview. Similarly, law teachers should explain and justify on the basis of what theoretical assumptions and what sources they make factual assertions about the content of the law.

Knowledge is always fallible and disputable, when it comes to both normative and factual statements. In order to give students a feeling for the fragility of knowledge, it is important that teachers, in group discussions with students, take a counter position against the *communis opinio* in the group at hand, question it and demonstrate its ultimate groundlessness, as in Socratic dialogues.¹⁰ Inspired by Socrates, ancient Greek skeptics such as Sextus Empiricus developed practices of argumentative inquiry that are meant to expose internal contradictions within a given position. As a result, the dispute remains undecided and one has to suspend his/her judgment (*epoche*).¹¹ 'Skepsis' means an inquiry or an examination guided by reason and in search for truth, however in vain perhaps this search may be. In the interim that the university offers interruptions have to be built in that halt temporarily the creation of knowledge. Learning also involves the experience that one does not know or does not know enough. In ancient skepticism, the suspension of judgment served to attain a peaceful state of mind (*ataraxia*) so that one no longer worries about truth and falsity anymore.¹² In our view, the ultimate goal of the infinite questioning is not tranquillity of mind but, on the contrary, an increased awareness that knowledge is always a temporary and fallible construction and that it has – as soon as it is accepted and becomes naturalized and fixed as truth – a huge impact on our convictions and actions. In our modern age knowledge acquired at universities is used more and more to intervene in society.¹³ Reflecting on the way knowledge shapes society, for better or worse, should therefore be part of every education. Students have to learn that knowledge, in its application, can be misinterpreted, distorted, even abused and has yet unknown side effects.¹⁴

Finally, on the institutional level, the faculty management has to provide for a mixture of teachers with different political, cultural, and religious backgrounds. If they are exposed to a variety of opinions, students will soon discover that truth in science is always a matter of debate. As Oakeshott argues, education is an introduction to a shared inheritance. However, the inheritance that is handed over

10 For an introduction to the Socratic method in legal education, see Areeda 1996.

11 Burnyeat (1983) gives an insightful description of the skeptical practice of inquiry.

12 In our view, skepticism does not necessarily involve the exclusion of emotions that Nussbaum (1994) rejects in ancient and modern skepticism. On the contrary, these emotions can be part of a critical inquiry, both as an object of inquiry (in order to understand which emotions sustain a specific argument) and as a means of criticizing a certain position (when it contravenes significant emotions such as sympathy or love).

13 According to Giddens (1991, p. 123), the era of late modernity is characterized by 'regular shifts in knowledge-claims as mediated by expert systems'.

14 Weber (1989, p. 22) puts it as follows: 'Anybody who is a reasonable teacher has as his first duty to teach his students to acknowledge "inconvenient" facts, I mean facts which are inconvenient for their party opinion.'

from one generation to the other is not a fixed entity, but is changed in every transmission.¹⁵ Every teacher will give his/her own version of the canonical texts, depending on the theoretical perspective and worldview s/he has adopted. Not one dominant voice should be heard, but a plurality of voices. This plurality of voices will inevitably be a *limited* plurality, because not everyone will be allowed to speak. In the selection of teachers not only academic requirements are applied (teachers have to have the right qualifications), but also norms of decency (teachers have to meet some standard of good behaviour and political correctness).¹⁶ Kennedy (2004, p. 15) is undoubtedly right that the mainstream in law schools is quite moderate. Generally speaking, law teachers are conservative in the sense that they want to protect what they deem to be valuable in the law as it is. They tend to resist radical change because they believe – for good reasons – that a legal system can only function properly if the law is more or less stable and predictable. However, within this mainstream many different (liberal, republican, conservative, communitarian, feminist and other) positions can be discerned and, if one listens carefully, one may even hear some radical and ‘critical’ tones. In order to set the stage for a (by necessity limited) plurality of voices, the curriculum should not only consist of courses where the ‘black letter law’ is taught, but also of courses in which the law’s efficacy and legitimacy and its historical development can be discussed on a more principled and theoretical level. This is the field of the so-called ‘meta-juridical’ courses, such as legal sociology, legal theory, legal philosophy and legal history. Although they are doomed to remain in the periphery, as Kennedy (2004, p. 36) notices rightfully, they are central for critical reflection on the law as it is and how the law ought to be according to mainstream law teachers who teach ‘black letter law’.

Skeptical legal education does not mean that law teachers have to reject the legal system at hand, in part or in whole (nor do they have to embrace it wholeheartedly). It means that they are asked to present their knowledge claims and value judgments for what they are: fallible opinions which are debatable and have to be debated within the community of both teachers and learners. This will improve the students’ faculty of judgment and make them more critical towards people who want to impose their worldview on them. So it appears that learning, after all, does have an indirect instrumental value: namely to make students skeptical towards any attempt to instrumentalize knowledge for dubious purposes and to apply it in an uncritical manner.

4 Skeptical legal education in practice: the Law & Lounge experiment

As explained above, skeptical legal education requires active students and detached teachers. An experiment, carried out at the Faculty of Law, University

15 This follows from Gadamer’s characterization of understanding as application (Gadamer 2006, p. 305-308).

16 Universities will, for instance, not be inclined to give voice to teachers with overtly fascist sympathies.

Utrecht, sought to bring into practice these requirements.¹⁷ The experiment – colloquially called ‘Law & Lounge’ – was embedded in an introductory course of law, mandatory to all first year students in the honours program. The introductory course provides students with the foundations of Dutch modern law, addressing themes such as legality, the rule of law, justice, liberalism, equality and solidarity, adjudication and interpretation. These themes are explained in textbooks which students study at home in preparation for the class room sessions. In class, the themes were reviewed on the basis of study questions and assignments.

The approach taken in the introductory course discourages students accessing the primary sources (fundamental texts in legal philosophy, legal theory and sociology of law) and critically assessing their conceptual, moral and political presuppositions. The teacher focuses on knowledge transfer to the students through the use of textbooks in which these primary sources are explained and summarized. The teacher may teach the students ‘the rules of the language’ but he does not show ‘how students can make their own contribution to the on-going conversation’. This approach is defended with the idea, or so the argument goes, that first year students would not be able to read and critically assess primary sources, because they are deemed to be too difficult.

The Law & Lounge experiment sought to allow students to make their own contribution to the conversation, building upon two basic assumptions. The first relates to difficulty. It is important that we confront students from the very start of their academic career with primary sources, or fundamental texts that underscores a broader understanding of law and legal concepts. It may well be that first year students find these texts difficult and perhaps understand only part of the theory presented in the texts at hand. We as teachers should not expect students to understand the texts in the way we do – it took us time and effort as well to fully understand them. Furthermore, students will read many such texts or at least the themes these texts address (such as theories on power, legality, etc.) repeatedly and over time their understanding of them will improve. The aim of the experiment does not lie in explaining students how to fully understand such texts, as if it were a course in exegesis, with the sole aim of reproduction of knowledge. The aim is rather to awaken in students a critical potential and assess the value of the theories presented in the selected texts and in the social context of today’s world.¹⁸ It starts with exposing them to texts and confronting them with what can be termed ‘intellectual uncertainty’. It expresses the idea that knowledge must be gained, that it takes an effort and that it exists also in searching one’s own thoughts for clues about what the text means and the learning purposes it may serve. Research shows that if students are challenged in education, their capacity to learn improves significantly (Scager et al. 2012).

17 This experiment was carried out by Bald de Vries, co-author of the present article.

18 This doesn’t mean that course in logic and argumentation is not essential in a law degree curriculum. The point is that it is more efficient to do one thing at a time.

The other assumption relates more directly to the first two conditions that were described above: the attitude of students and the position of the teacher. These are communicating vessels: when a teacher puts herself at the centre of the learning process, telling students what they must know, giving them the 'right' answers, she creates a passive audience of students, who are merely encouraged to process information and apply – unreflective – the trick of legal analysis exemplified by the case study method. White (1986, p. 156) already pointed, in a somewhat caricature fashion, to the numbing experience of students of the case study method: 'a wonderfully exciting educational experience degenerates into a mechanical and empty ritual that robs it of almost every value, a transformation in which both sides are complicitous.' As White (1985, p. xiv) explains, the study and practice of law is a creative act – 'an art, a way of making something new out of existing materials'. As a side effect, students may become aware that law is more than 'positivistic and rule-based' (p. xii).

Is it possible that students 'take over' and are put in full control of the classroom sessions, as a means to experience uncertainty, responsibility and creativity? Pedagogically, this was the first aim of the Law & Lounge experiment. In their very first semester, students experienced how it is to be a teacher, how it is to take responsibility, as a group, for their own learning process. Second, considering the contents of the course – studying and discussing basic texts about legal concepts – the aim was for students to experience the confrontation with the uncertainty of not-knowing (without resorting to authority (the teacher, as s/he remained detached in a radical way), and to discover that this is part of the learning process as a step to adopting a critical, skeptical attitude.

The experiment consisted of ten sessions that ran parallel to the 'normal' class sessions and were offered to three groups of first year honours students, the groups consisting of about 17-22 students. The sessions were made part of the honours programme and they were in this sense mandatory. Students did not receive a grade, nor was there a final exam or a paper to write. The reason for not examining the students was to prevent any strategic behaviour focused upon grades. Each session lasted an hour. The preselected literature and one documentary were linked, directly or indirectly to the themes of the course, including texts of John Locke, Thomas Hobbes, James Boyd White and Oscar Wilde.¹⁹

All students were expected to read the texts in preparation for the class discussion. In addition, in each session a small group of about three students was responsible to organize the session as they saw appropriate, and lead the discussion. The role of the teachers was limited to that of an observer. They would, if asked, discuss prior to a session with the students who were responsible for that session, their ideas about how to organize the session and afterwards would give some feedback on the chosen format. The teachers did not interfere with the content of the discussions about the texts. No 'right' answers were given, nor did the teachers explain to students the essence of the texts. It was up to the students them-

19 See Table A, below, for an overview.

selves to figure that out, together during the group discussion. In general, the sessions had the following pattern: a brief introduction of the author, a short presentation of the essence of the text, and a discussion based on a few theses formulated by the group responsible. Usually, these theses sought to link the text to contemporary societal problems.

Upon completion of the course a number of (preliminary) observations can be made.²⁰ These relate to (1) the central pedagogical aim of students 'taking over', (2) the format chosen by the students, (3) the critical potential (skeptical legal education) together with (4) the role and position of the teacher in terms of the selection of the texts and his scholarly assumptions and perspectives. In the last two observations a link is established between the experiment and the concept of skeptical legal education.

The use of self-organization (as a pedagogical tool) without 'supervision' is feasible, when certain conditions are met. As said before, the students were honours students, selected to take part in the honours degree program referred to as Utrecht Law College. They are selected on the basis of past (school) results, motivation to learn, academic curiosity and societal interests. As the groups stay together from day one, they quickly get to know each other, creating together with the teachers an 'academic community'. It was obvious to them to come prepared to class and to have an active attitude during class sessions. Indeed, research shows that honours students score high in respect of intelligence, creative thinking, openness to experience, desire to learn and a drive to excel (Scager et al. 2011). The students took the experiment serious and took responsibility for their learning process. (This is not to say that all students equally 'liked' reading the texts and discussing them.) However, the task of organizing the individual sessions by students remains a cause for concern. The chosen format and developing pattern – that was not intervened with – caused students to study and discuss the texts on a level that appeared too superficial. They felt that they were being thrown into the deep without the tools to both read such basic texts and discuss them. After each session, they felt uncertain about their efforts in understanding the text and its essence. The experiment could be improved in this respect. However, the idea of intellectual uncertainty is considered to be a positive effect in shaping an academic and critical attitude insofar this uncertainty triggers curiosity – the desire to find out. As the experiment progressed and students found connections among the texts and between the texts and the 'ordinary' course sessions, students slowly started to understand (and accept) the value and function of this uncertainty.

The idea of intellectual uncertainty connects the observations about the format of the experiment with the observations relating to skeptical legal education and the role and position of the teacher. Oakeshott referred to education as 'the art of conversation'. The experiment allowed students to engage with each other about

20 The experiment is currently subject to further (empirical) research by reference to educational theories in respect of honours teaching, self-organization, grading and feedback.

ideas, theories and concepts, found in the authoritative texts that underpin the understanding of (positive) law. In doing so, students are put in a position to develop their own critical view about law and its foundations, formulating answers to the fundamental questions: What is law? What is its function? How to recognize law? This view and these answers may be naïve at first but as students are progressing in their studies their view on law does become more sophisticated and academically sound. As far as the position of the teacher is concerned, the experiment takes ‘detachment’ quite literally, in the sense that the teacher gives over ‘control’ of the learning process. We would not promote, to be sure, this to be a pedagogical *Leitmotiv* in the entire curriculum but to allow students (in the shadow of the current approach in which the teacher is in control) to take over does seem to inspire them. It makes them realize the responsibility they have, as students, for their own learning process. The experiment presupposes a skeptical attitude: the awareness that theories about, for example, power, equality, freedom, punishment and so on are diverse and can be questioned. Questioning is inquisitive – a means of learning and academic self-development. Questioning (being critical) does not imply these theories are necessarily wrong, as if students must express an opinion, but refers to ‘the suspension of judgment’. The next step is to introduce the idea of reflexivity, as set out above, and to go a step further. It exists in eventually making a judgment about law and its functioning in contemporary society with an aim of continuous legal development and the need for change.²¹

5 The suspension of judgment

Building upon the concept of liberal legal education, as espoused by Oakeshott, we introduced the idea of skeptical legal education. Whereas Oakeshott stresses the importance of the ‘interval’ – a non-instrumental moment of learning and suspended judgment through the art of conversation –, we put moral and intellectual integrity in the centre of legal education. It refers to the requirement that students feel responsible to use their own faculty of judgment when encouraged to do so while studying and discussing legal texts. Skeptical legal education stresses the importance of conversation, discussion and suspended judgment and in doing so it promotes the students’ critical potential. A skeptical attitude starts with the intellectual awareness that knowledge claims cannot be taken for granted but must continuously be questioned in order to properly understand and use them in a critical way, and to do so from a detached point of view rather than on the basis of a particular political ideology. After they are graduated, lawyers can use their skeptical attitude to contribute in a critical way to the development of law. After all, legal education is to a large extent oriented towards legal practice and those who we teach will shape legal practice.

Skeptical legal education poses a challenge to legal education, its teachers and students as well as the organization of law faculties. The experiment illustrated how

21 In the future this element will be added to the experiment.

we can give shape to skeptical legal education but, obviously, skeptical legal education is not limited to this example. What the example shows is that learning and teaching must be a collective activity where learners and teachers each can have their responsibilities, which law faculties must be able to provide and facilitate. It may be that skeptical legal education fits well at first sight within the so-called meta-juridical courses in the field of, for example, legal philosophy or the sociology of law, but it is not necessarily restricted to these kind of courses. At each level and in each course skepticism is required to understand law as it is and *why* it is as it is. It is only then that students can draw their own conclusions about the law and its meanings and operations and how the law as it is can or has to be changed, in the awareness that these conclusions are temporary and questionable. Skeptical legal education also allows them to raise questions about their role as a lawyer: What type of lawyer do I want to be? How do I shape my career as a lawyer? Questions that equally apply to us teachers: What are our moral and political values? How do I want the law to be and why? What kind of law teacher do I want to be for my students? How do I want them to prepare for the practice of law?

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Supplement Table A

Course themes:	Selected texts: ²²
1. Legitimacy of power	Locke, <i>Second Treatise</i> (excerpts)
2. Sovereignty	Hobbes, <i>The Leviathan</i> (excerpts)
3. Research methodology	Siems, 'Legal Originality'
4. Fair trial/authority	Documentary: 'The Millgram Experiment'
5. Judicial autonomy	Wiarda, <i>Drie typen van rechtsvinding</i> (excerpts)
6. Law and sociology	Schwartz, 'Social factors in the Development of Legal Control'
7. Justice	Wissenburg, 'Aristoteles over rechtvaardigheid'
8. Liberty	Mill, <i>On Liberty</i>
9. Equality and solidarity	Wilde, 'The Soul of Men under Socialism'
10. Legal education	James Boyd White, 'Doctrine in a Vacuum' ²³

²² Full references are available upon request.

²³ The last session deviated from the course theme and instead concluded with a discussion on legal education.

²² Full references are available upon request.

Legal Dogmatics and Academic Education

Jan Struiksmā

1 Introduction

1.1 General starting points

Labelling academic education as an independent objective, as if it could be separated from academic education as such, is a misunderstanding. By this I mean that this type of education must be integrated in the courses that are part of the academic curriculum. Education can only be deemed academic in nature if this is exclusively the case. This means that the education must be focussed on making the students understand how a theory which is expressed in a subject comes into being, and how this can be reflected, added to, extended and improved. For brevity's sake we refer to this as theory development.

I interpret theory, following De Groot, as a system of logically related and, in particular, compatible assertions, views and definitions concerning a reality field, which has been formulated in such a manner that verifiable hypotheses can be deduced from it (De Groot 1969). A theory makes connections between observations.

The above statement does require some qualifications. There are subjects which form part of the core of a course, and subjects which have a supporting and generally exploratory function. Consider hereby, for example, subjects such as statistics or mathematics, which teach specific techniques that are necessary in order to be able to conduct the research for the purpose of theory development in the core courses. In these subjects the intention is not to teach theory development; that takes place in other courses.

Theoretical knowledge is (ultimately) intended for the purpose of ordering observations. This knowledge is checked against reality and therefore also applicable to this reality. In other words: theoretical scientific research (virtually) always goes hand in hand with practical application, if not right away, then within a foreseeable period and sometimes in a manner which cannot be predicted. As will be described, students learn the skill of conducting scientific research on the basis of the practical application of scientific knowledge. In almost all scientific courses, therefore, a dual result emerges, meaning that students on the one hand have the (initial) skill of being able to conduct scientific research, while on the other hand they are also able to apply scientific knowledge. It is known that this is also the case for legal courses.

1.2 Problem definition and research objective

In legal courses there are a number of central subjects within which the concepts developed in various areas of law – private law, public and administrative law, and

criminal law – are studied in their mutual cohesion and application. We refer to these subjects as dogmatic. We can refer to the entirety of the systematically ordered concepts as dogmatic legal theory. This theory has a long tradition, but contemporary Dutch dogmatic legal theory is without a doubt strongly influenced by the work of nineteenth-century German lawyers, sometimes referred to under the name ‘Rechtswissenschaft’ (Legal Science). Although the practitioners of German dogmatic legal theory therefore spoke of science, it is not always clear what its subject and method was (Reimann 1990).

It is remarkable that, within Dutch dogmatic legal science, this is still the case.¹ It is therefore all the more remarkable that law students are still being instructed in drafting dogmatic theory. One may presume that making the methods of dogmatic legal science more explicit was never considered necessary because they are implicitly included in the manner in which education is provided within the dogmatic subjects. This is further suggested by the fact that, within the dogmatically tinted legal investigations, there is hardly any account of the methods used. In legal science a personal narrative manner has developed on the basis of tradition, whereby the research results are presented. Tijssen (2009) refers to this in his dissertation, following Voermans, as ‘following elephant paths’.

Previously I developed a model whereby the evolution of dogmatic legal theory design can be made more explicit.² This concerns, amongst other aspects, the application of the empirical cycle constructed by De Groot, which forms the final element of an evolution of the application of mundane knowledge to theory design. The ideas of De Groot are widely accepted and used by social scientists.

The starting point of the article before you is that this evolution must be ‘repeated’ during an academic study in empirical subjects. My objective is to investigate how this is done in the legal dogmatic education. Until now this growth from mundane knowledge to theory design is implicit. A lot can be said for making the several steps to be taken more explicit, because it would make the course toward theory design run more efficient. Many matters which now remain implicit could be denominated and discussed in the interaction between lecturer and students. Furthermore, cooperation with other scientific areas can be greatly improved if a connection is sought to generally accepted methodological starting points.

1.4 Structure

In section 2 I will provide a short overview of the ideas of De Groot regarding the evolution of mundane knowledge into theory design. During academic study a student must take various steps in order to complete this evolution. In section 3 I will develop a general model by which these steps and their content can be

- 1 See for example Peczenik, Lindahl and Van Roermond 1983. At the beginning of this century a heated and comprehensive discussion was conducted about this subject in the Netherlands, which has not resulted in unanimity.
- 2 Struiksma 2012. Also available on <http://hdl.handle.net/1871/38649> and <http://ssrn.com/abstract=2168660> or <http://dx.doi.org/10.2139/ssrn.2168660> (Struiksma 2012). For a better understanding of the article before you, reading of this publication is recommended.

understood. Section 4 contains an analysis of the specific characteristics of legal dogmatic theory design, on the basis of the model referred to earlier on (Tijssen 2009). In section 5 the steps, described in section 3, will be applied to the legal science course. Section 6 will contain a conclusion.

2 The empirical cycle

De Groot has described how the development from mundane thinking processes to the scientific approach should be imagined. Man can reflect on the process whereby he gains experience. He is aware of a specified objective which he keeps in mind, of the resources which he uses, the choices which he makes within that context, and the effects which specific resources produce with a focus on the objective to be achieved. An evaluation therefore takes place, whereby the effectiveness of the resource in relation to the objective can be recorded. The result of the evaluation can be stored in his memory to be used at the next opportunity.

Man is aware of his presumption of cohesion within reality, of expectations with regard to the effect of his responses to this reality and of the fact that he tests these expectations through his response. There is therefore a cycle of psychological processes which support and influence this interaction with reality. De Groot refers to this cycle as an empirical cycle within thought processes and describes this as follows (De Groot 1969, p. 6):

observation-supposition-expectation-testing-evaluation

Because man is aware of the manner in which actually occurring problem questions can be solved, he can also define those solutions separately from the problem questions. He no longer responds only to practical problems, but also defines theoretical problems. This is referred to as a 'shift from end to means' (De Groot 1969, p. 7).

I will provide an example here. During the developmental history of humanity, farmers have quickly gained experience with regard to types of crops, signs of change in the weather and the consequences of seasons. They gained this practical knowledge by making decisions about times for sowing and harvesting. That seasons change is a fact of common knowledge. Even in the early history of mankind, this fact was not just accepted, but people also sought explanations. There was soon a shift from end to means: the knowledge (the changing of the seasons) whereby a problem (decision on sowing and harvesting) could be solved, was defined as a problem. At first, the explanations were sought in the supernatural, but subsequently – after the necessary theoretical interim steps – people realized that the trajectory of the earth around the sun, and the tilting of earth's axis in relation to its trajectory, formed an adequate solution to the problem. Furthermore, a

theory was formed that was not limited to decisions that can be substantiated in the context of agricultural operations.³

According to De Groot there are cycles for the various stages of abstraction of the experience from reality and reflection on the knowledge gained. For the most abstract forms of the cycle he refers to the thinking subject: he gains real experience from the outside world, he becomes aware by reflection that he does so, he defines the finding of resources as a problem and seeks to solve that problem, he carries out part of this mentally with the focus on complex, abstract objectives set by culture, possibly with the aid of specific or abstract models of the part of the 'world' it concerns – and whereby the subject ultimately will enter into consultation with others about his process of experience (De Groot 1969, p. 17).

The reasoning followed and the research conducted must be presented for the purpose of communication. This implies that the thinking and research method used, and the results found, must be represented in such a formalized manner that the 'forum members' can follow the reasoning. This does not only set requirements for the manner in which the cycle is presented, but also for the way in which the reasoning and the results are worded. These must, as it were, be 'standardized' or, if new, be brought in line with wording which is already standardized. Science strives for explicit, transferable knowledge (De Groot 1969, p. 19).

De Groot has referred to the process of theory development as the scientific empirical cycle, whereby he makes a distinction in the following five stages (p. 28):

1. Observation: collating and grouping of facts material.
2. Induction: formulating of hypotheses.
3. Deduction: deducing special consequences from the hypotheses in the form of verifiable predictions.
4. Testing of the hypotheses against the realization, or otherwise, of predictions in new empirical material.
5. Evaluation of the result of the testing.

3 Course for theory design in general

When a student starts an academic course he will, as it were, find himself in the situation in which our predecessors found themselves at the time that scientific development had yet to start. He must, in a limited time, repeat an evolution of the application of the mundane, practical knowledge to theory design, with which others have potentially been occupied for centuries. However, there is a difference: the scientific knowledge is present in a condensed form and the core of this can be transferred in a relatively short time. Somewhere in that short time the student will have to make a shift from end to means.

3 Example derived from Deutsch 2012, p. 24.

Firstly, a student will have to become aware of connections in the relevant reality area and of the existence of scientific theories with which those connections are described. It must become clear to him that there are elements in the relevant reality area for the course to which the theory can be applied. Not all elements are relevant, and he will therefore have to make a selection in the light of the theory. The problem is therefore that he must know the theory in order to be able to select the relevant aspects, while he must learn to apply the theory on the basis of the relevant aspects. This impediment can be overcome by the lecturer dealing with problem questions to which the theory can be applied. In the course of this he will demonstrate what the relevant aspects of the problem question are, as well as why they are relevant, i.e., in the light of the theory. The lecturer acts as a role model, namely as an expert. An expert has such extensive knowledge of theory and practice that he intuitively senses, in many cases, which theory must be used in a given case. However, education and experience are the basis of this knowledge and intuition. The lecturer must be aware that this knowledge and intuition cannot be transferred just like that, but that it primarily concerns the teaching of the reasoning process. He must be able to imagine himself in the position of an ignorant person. He must therefore start with simple applications, whereby the applicable theory can be found immediately by the simple selection of not too many relevant observation aspects. Subsequently, the degree of difficulty can be increased by offering a number of possibly applicable theories and to have the number and complexity of the observation aspects increased. The student now has to make choices, on the theoretical as well as observational side, in the course of which he will subconsciously follow a mental empirical cycle with reflection referred to by De Groot (1969, p. 12). There is an *objective* (the finding of an applicable theory) which is a *problem* for the student. There is a certain *freedom* during the choosing of applicable theories, and there is also *uncertainty* about the question of which theories will be most applicable. The student makes a tentative *choice*, applies the theory, by *trying*, to the aspects concerned and *verifies* by assessing if the chosen theory can connect those aspects sufficiently. If not, then a new theory can be chosen, or the choice of the relevant aspects can be changed. Subsequently, the cycle will be repeated, until the required result has been achieved. To reinforce the learning process, a lecturer must check the steps followed by a student, and if necessary improve them or provide an example. Unfortunately we have noted that this, given the large scale of most courses, is not always possible.

Gradually the student becomes familiar with theories by applying them deductively to problem questions. To do so it is always necessary to apply a theory to the correct aspects of a problem question. By coming into contact with a large number of problems, he learns to see that problems are comparable, in the sense that they have similar aspects which can, by induction, all be brought under a specified theory. This often appears in the following form: problem question A looks like problem question B. Theory X is applicable to problem question B; let us see if X can also be applied to A. This is, of course, no problem if the aspects of A and B can be generalized in the same manner, but if this is not the case, then this does

not mean that X has to be unusable. It can possibly be adjusted in the sense that it retains its general working method, but works for a number of special cases. At that time there is theory development, which can be demonstrated within education after some time, for example after the core doctrines of a subject have been taught. At that time the student has learned that the characteristic of a theory is that it describes a connection between a large number of cases. In the beginning the student sees the application in one case, and by consistently bringing cases under the theory, similarities in the cases will become apparent. At that time it can dawn on the student that the theory is made from the similarities of the cases, while the test is always if the next case also falls under it.

In summary, the student first learns to generalize the aspects from the particular details of the case which can fall under a theory, and to verify the applicability of that theory by means of deduction. There is a tacit assumption thereby that a theory can be found which will be applicable to all comparable cases now and in the future.⁴ Subsequently, the student learns to generalize comparable cases to form the theory in the course of which the objective changes. The problem is no longer finding an already existing theory which is applicable to a specific case, but to form a new theory or to adjust an existing theory in such a manner that it will be applicable to many cases. It does not concern the practical application of a theory as an objective, rather the theory design is the objective.

The manner of reasoning to be followed during theory design must be imprinted step by step. On the basis of studying and internalizing examples, the student is guided to personal theory design. The guiding principle thereby is that, primarily, the presence of a theory is given together with the representation of a limited number of observations which do not, at a glance, fall under the working of the theory. Let us call these observations problematic observations. The assignment is to adjust or extend the theory in such a manner that the problematic observations can be brought under the working of the theory. In the beginning the assignments will be simple. Later on the assignments can be more difficult, in the sense that a theory to be adjusted does exist, but must be found by the student himself. Furthermore, it cannot be clear from this theory that it is applicable. It is also possible that the theory is in parts internally contradictory. The degree of difficulty can be increased by presenting a larger number of problematic cases, of which it is furthermore not immediately clear what the connecting factor in their problematic character is. However, what these assignments do have in common is the fact that the theory must be described, including the relevant published literature, from which possible solution directions can be derived. After this an analysis will be made of which observations or parts of the theory are problematic and why this is the case. The analysis will result in induction of the similar aspects of the problematic observations and parts and a presumption of the manner in which the theory must be adjusted so as to be applicable. After adjustment, the theory will be applied in a deductive manner to the problematic observations,

4 Of course we know that the induction principle is not tenable from a formal point of view, but in practice it is indispensable.

but, for the purpose of verification of the integrity of the theory, also to the previous non-problematic observations. This application can provide various outcomes: (1) after application the theory works without difficulty, (2) the application solves the problems only partially, (3) the application causes new problems. In the latter cases the similar aspects of the problematic observations will be again induced until there is a presumption of solution.

Ultimately some students will reach a level which enables them to not only independently adjust existing theories, but also to form new theories and to conduct research of a large extent and scope. This level is required to be able to complete a doctoral thesis.

It goes without saying that the student acquires competence in scientific reasoning methods while at the same time mastering the rules for proper scientific reporting procedures.

The steps students go through in the course for theory design can be summarized as follows, on the basis of the previous section.

1. Initiation by practical applications

A student must become aware of the existence of scientific theories and their workings. For this purpose he discovers that there are elements in the reality area relevant to the course to which the theory can be applied. Not all elements are relevant, and that is why he must form a selection in light of the theory. The problem is therefore that he must know the theory in order to be able to select the relevant aspects, while he must learn to apply the theory on the basis of the relevant aspects. This problem will be overcome because the lecturer deals with simple examples, whereby he shows what the relevant aspects in the problem question are and also why they are relevant, i.e., in light of the application of the theory.

2. Deepening by practical application

The degree of difficulty of the practical application will be increased by offering a larger number of possibly applicable theories and to have the number and complexity of the observation aspects increased. Now the student must make choices, on the theoretical side as well as on the observational side. He thereby follows a mental empirical cycle.

3. Recognition of theory development

By solving a larger number of problem questions with the aid of a theory, a student learns to see that problem questions are comparable, in the sense that they have similar aspects which can, through a cycle of induction and deduction, always be brought again under a specified given theory. The student breaks free from the practical application of a theory and makes the shift from end to means. He realizes that a theory, by means of induction and deduction, can be formed from problem questions.

4. *Initiation into theory development*

The student takes the first steps while going through of the scientific empirical cycle. The assignments are simple, in the sense that quite a lot of details are handed out ready-made. Through examples the student learns the application of methods relevant to the various stages of the cycle.

5. *Deepening of theory development*

The student takes further steps. The assignments are more complex; gradually fewer details are handed out.

6. *Independent theory development*

The student formulates, if necessary with some directions, a personal definition of a problem and research hypothesis and independently goes through the scientific empirical cycle. However, the extent and scope of the research are limited. If that limitation is removed we are talking about research for the purpose of a doctoral thesis.

4 Legal science theory design

Somewhere in the history of the development of law, perhaps even at different times, the shift was made from end to means. Law was primarily seen as being of supernatural origin; much later awareness appeared that law is made by humans.

The basic material in dogmatic legal science comprises the concepts through which relations and conduct are indicated, and the accompanying definitions (Struiksma 2012, p. 12ff). These concepts are not directly derived from reality, but from the representation of this reality in the form of judgements that were and are delivered for the resolution of disputes. The disputes are the empirical material of the science. The definitions function in rules intended to influence conduct and which are applied to resolve disputes. Relations and conduct, as they have actually occurred, are transformed in dispute resolution through the classification of facts and circumstances into concepts from which the rules are constructed, as a result of which those rules can be applied to the dispute to be resolved.

Through centuries of (still on-going) development, the concepts are provided with definitions by science in the form of an inductive/deductive process, by studying the manner in which they are applied in the resolution of disputes. They have therefore arisen from the practice of dispute resolution. Subsequently these concepts have also again been placed in increasingly large collections of concepts. Especially through the fact that science provides concepts with a uniform description, it is possible for these concepts to acquire a general working in the form of regulations.

The sources from which the theoretical body of concepts is added to, and against which they are verified, increase in extent and number during the development of

the law and legal science. It no longer concerns merely the judgements, but also the commentaries. In these commentaries the meaning of a judgement, and more particularly the meaning of a specified concept is discussed in light of a specified doctrine. Does the judgement fit within that doctrine, or is this not the case? On the basis of such discussion all sorts of follow-up questions can be posed, such as: Was this a rarity? Was it just about an error? Does this provide a new opening? And if so, what does this mean for the system of a doctrine?

Furthermore, the meaning of a specified concept, or at least the start of this, is (also) derived from the explanation of that concept which the regulator has provided in the context of the formation of rules.

The body of concepts is described and subdivided into doctrines in manuals, textbooks and monographs. They are indispensable in the search for differences of opinion and knowledge gaps, i.e., to formulate research hypotheses. Furthermore, there are dissertations in which the results of new research are presented. Although such research relates to a manageable research topic, the design is broad, in the sense that an extensive exploration of the state of affairs takes place, following which the research topic can be verified against a broad range of sources. In addition there are publications in magazines in which results from research are presented. Research publications can serve as the starting point for follow-up research.

In all this the judgements remain the most important source. Ultimately all judgements which are delivered about definitions and their cohesion are verified against the manner in which concepts are actually applied. Whatever meaning scientists, regulators or advisors give to definitions, it is ultimately the adjudicator who determines the final meaning, although this takes place in an indirect manner (Struiksma 2012, section 17ff).

In recent years pure dogmatic research has reduced in numbers. Annotations are being made and the manuals are kept up to date, but dissertation topics are increasingly interdisciplinary and multidisciplinary in nature (composite research). One could therefore argue that the course in theory design, especially with regard to the education of research methods, must be more focussed on the fields that are relevant for the composite research.⁵ This appears to be correct, but we must not lose sight of the fact that the maximum amount of credits to be achieved in the academic studies are fixed and that, in any case, plenty of attention must be paid to the dogmatic subjects, because they are required in the context of the 'civil effect' (a master's degree with 'civil effect' is a condition for admission to the legal professions or judiciary). Furthermore, it is necessary to maintain the skill of dogmatic theory design, because if this were to be lost in the times to come, the tenability of positive law would be affected from the inside and composite research would also no longer be possible.

5 See, e.g., Van Gestel, Giesen & Van Boom 2012.

5 The course in legal science theory design

Through the courses in dogmatic subjects, the steps described above in the development of legal science must again be gone through in a condensed form: from learning the application of rules to cases, to the forming, maintaining and systematizing of the concepts by which those rules are formed. A problem is that the students, at least to my knowledge, are not being taught that it concerns a scientific theory in the body of concepts. They are traditionally taught the meaning of concepts in the form of solving a case, whereby the impression arises that the only objective is to learn to apply rules. They therefore do not apply at first sight a theory, but instead rules with which disputes can be solved. Indeed, rules are not in themselves a theory, but the rules are formed by concepts which are derived in a scientific manner from practice. One tends to argue that this is a study focussed on practice. However, to learn to apply rules is only a means to teach students the meaning of concepts in their mutual cohesion, a necessary condition to be able to make the step toward theory design. I think that in the current curricula not enough specific attention is paid to this.

1. *Initiation by practical application*

The student must become aware of the existence of scientific theories and the working thereof. For this purpose he discovers that there are elements in the reality area relevant for the course to which the theory can be applied. Not all elements are relevant, and that is why he must reach a selection in light of the theory.

The student will be handed simple legal cases and the lecturer provides an example, from the facts and circumstances of which a selection must be made, and in which manner this must be translated into concepts to be able to apply a legal rule with which the dispute processed in the case can be solved. The student learns about variants which can be solved in a comparable manner, as well as on the basis of the example case from the law of precedent. The student learns the definitions and their application on the basis of a textbook or manual. A start is made on the teaching of the mutual connection of the concepts.

2. *Deepening by practical application*

The degree of difficulty of the practical application will be increased by offering a larger number of possibly applicable parts of the theories and by increasing the number and complexity of the observation aspects. Now the student must make choices, on the theoretical side as well as on the observational side.

The student gets handed more complex cases in which it is not immediately clear how facts and circumstances must be classified in light of a specified part of the theory. Depending on the classification, various parts of the theory are applicable. There is not only one answer which is correct at face value. Various sources must be studied and compared in order to obtain a proper view of the meaning of concepts.

3. *Recognition of theory design*

By solving a large number of problem questions with the aid of a theory, a student learns to see that problem questions are comparable, in the sense that they have similar aspects which can, through a cycle of induction and deduction, always be brought under a specified given theory. The student breaks free from the practical application of a theory and makes the shift from end to means. He realizes that a theory, by means of induction and deduction, can be formed from problem questions.

In the application of law to more difficult cases it often concerns demonstrating that a rule can be applied by showing that the rule has also been applied in a comparable case. Of course, for this it must first be made plausible that it does indeed concern a comparable case. Viewed in that light the student must be able to interpret the meaning of the concept (as part of the rule) to be applied on the basis of as many sources as possible. Subsequently he must demonstrate that the relevant facts and circumstances of the case under consideration and the example case can be brought under the concept in the same manner, possibly by first varying the meaning of the definition within certain, but responsible, margins by following an interpretation method.⁶ During this process, theory design takes place in a certain sense, because the meaning of a concept must be tentatively adjusted. So there is formation of a hypothesis, albeit in the context of a practically focussed application. Still, the emphasis is beginning to shift to the theory, because a hypothetical adjustment does not only have to be verified in practice, but also in theory. Since an adjustment is not possible if the cohesion with related concepts is affected, and also not without the earlier application if the concept is corrupted. Also, possible future applications of the concept can be tried out on the basis of imaginary cases. In this manner the student will become more familiar, while solving difficult cases, with the requirements which the theoretical system sets for practical applications. He makes the shift from end to means, but this jump is not marked in the course and is also not recognized by many students. It is a gradual process, which is faster for one student than for another.

4. *Initiation into theory design*

The student takes the first steps while going through the scientific empirical cycle. The assignments are simple, in the sense that quite a lot of details are handed out ready-made.

One could argue that the usual bachelor's thesis is the embodiment of this stage.

One problem is that the following of the cycle cannot be demonstrated on the basis of examples that are used until now. The examples that exist consist of classical, narrative, legal science literature. It is not easy for students to translate these examples into their own hesitant ideas. Furthermore, it cannot be expected from these students that they set up and work out a complete research project. It is more obvious that they will limit their efforts to exploration, description of a

⁶ See for a splendid example of a teaching method based on this approach Rozemond 2006.

definition of a problem and the formulation of a tentative research hypothesis, and that they describe and apply the accompanying research methods. However, there are no such examples, nor a statement of the methods relevant to legal science research. That many bachelor's theses are still brought to a good conclusion may be due to the fact that students have come to recognize theory design intuitively. They can translate this intuition with a bit of effort through solid guidance, in an exploration research project, which subsequently must be put into words in the classical manner. It is important to notice that the scope of the bachelor's thesis is limited in such a manner that a complete research is simply not possible.

5 and 6. Deepening of theory design and independent theory design

The student takes further steps. The assignments are more complex; gradually fewer details are handed out. Ultimately the student formulates, if necessary with some direction, a personal definition of a problem and a research hypothesis and independently goes through the scientific empirical cycle. However, the extent and scope of the research are limited.

One could argue that this stage must be gone through in the master's degree programme, which ultimately has to be completed with a master's thesis. The master's thesis can be placed under independent theory development.

So a bridge must be built between bachelor and master's thesis. As far as I am aware, this is not the case in Dutch master degree programmes. In the master stage there is a deepening in a specified area of law, a number of optional subjects are followed and the degree programme is concluded with a master's thesis. The bachelor's thesis contains the exploratory and descriptive part of limited legal science research. In continuation of this the provisional research hypothesis could be verified against research material. This approach would assume that students would choose a master variant which connects well to the bachelor's thesis. That is not necessarily the case. So there must be another manner provided for a continued theoretical development. The solution could be found by offering students, in the context of their deepening, a research hypothesis which they then must verify against research material (partially to be found by themselves). For this part, a separate skills subject could also be introduced. It should be noted that space could also be made for this approach in the optional subjects.

6 Concluding remarks

The objective of this article was to investigate how the evolution of the application of mundane knowledge to theory design is 'emulated' in the legal dogmatic education. To do so, I used the ideas of De Groot as developed in his book *Methodology* and some theoretical insights that I laid down in *The dispute as pivot*. My investigations resulted in a model consisting of six steps: initiation by practical applications; deepening by practical application; recognition of theory design; initiation into theory design; deepening of theory design and independent theory

design. These steps can be traced down in the legal dogmatic education and should be made more visible in the education programme.

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Alternative Methodologies: Learning Critique as a Skill

Bal Sokhi-Bulley

1 Introduction

Halfway through the year of postgraduate studies that is required for the LLM at Queen's University Belfast, I give a talk to the students, entitled 'Asking the Right Questions: Understanding Methodology'. It is not always particularly well received. On one occasion I was approached by a student afterward, who commented, 'All that "how questions" stuff confused the hell out of me. You should really think about whether we need to know that. Oh, and don't talk about Foucault!' In direct resistance to this comment, let me begin this article with a quotation from Foucault's essay 'What is Critique', where he describes the art of critique as 'a certain *way of thinking, speaking and acting*, a certain relationship to what exists, to what one knows, to what one does, a relationship to society, to culture and also a relationship to others, that we would call, let's say, the *critical attitude*' (Foucault 1997, p. 24). These are features of methodology – that is, of how to think (speak and act) a project. And so had this student engaged with my talk she might have seen that this is precisely the crucial importance of understanding methodology and being able to define it: it is your approach, your perspective, your *attitude*; it is, essentially, how you think. Thus it is about asking 'the right questions' *for you, for your project and what interests you* and these are 'how' questions. The 'how' question examines how meanings are produced and attached to various social subjects and objects, thus, as Roxanne Lyn Doty explains, 'constituting particular interpretative dispositions that create certain possibilities and preclude others' (Doty 1996, p. 4). It influences the research questions that you ask and it challenges assumptions. It determines, in other words, your 'critical attitude'.

This article stresses the importance and possibility of training the critical attitude. It suggests that the critical attitude, or what Foucault also calls 'critique', are characteristics of methodology – that is, of how to think a project. It is crucial that as *researchers* we are able to articulate our methodologies. It is also crucial that as *educators*, we can teach our students why they need to articulate the way in which they think. Can we therefore teach, the article asks, *critical* legal education? I suggest here that the way to do this is to market methodology as a 'skill' – and to thereby free it to some extent from what both students *and* researchers in Law often view as the negative connotations of 'theory'.

I begin by addressing the issue of why it is difficult to teach critical legal education. It is necessary then to tackle questions of how to define (alternative) methodology – and how exactly it is different from 'theory' and indeed from 'method'. The second section of the article then presents the need to market methodology

as a 'skill' to our law students – as a 'transferrable' skill that translates to the practical workplace and also as a means of seeing alternative truths in the practice and understanding of law and society. It discusses this as a way of hopefully producing a student that is *not* docile and disengaged (despite being, nevertheless, a successful lawyer) but, rather, is able to nurture an attitude that allows for 'thinking' (law) critically.

2 The difficulty in teaching critical legal education: what is methodology?

2.1 *The apathetic attitude*

The struggle for 'a radical egalitarian alternative vision of what legal education should become' by observing it through the lens of Critical Legal Studies (CLS) has already famously been identified by Duncan Kennedy in his 'little red book', first published as a pamphlet in 1983, entitled *Legal Education and the Reproduction of Hierarchy* (Kennedy 2004, p. 1). Kennedy makes a 'utopian proposal' to help reduce illegitimate hierarchy and the feelings of alienation that students feel within law schools (p. 136-139). My article aims to engage in a slightly different struggle – that of making researchers and educators (and in turn students) *think* differently about how they teach (and read) law. It perhaps interprets 'critical' too loosely as an 'art of critique' and a certain 'curiosity' – which is an important word, since:

'the word [*curiosity*](...) evokes "care"; it evokes the care one takes of what exists and what might exist; a sharpened sense of reality, but one that is never immobilised before it; a readiness to find what surrounds us strange and odd; a certain determination to *throw off familiar ways of thought and to look at the same things in a different way*; a passion for seizing what is happening now and what is disappearing; a lack of respect for the traditional hierarchies of what is important and fundamental' (Foucault 2000, p. 325; emphasis added).

Panu Minkkinen also addresses the question 'what does it mean to be critical' when talking of 'critical legal method' (Minkkinen 2013, p. 119). Surely all research, at the doctoral level anyway, should be 'critical' in the sense that it employs 'critical judgement (...) a generic intellectual skill that all researchers are supposed to be able to apply in relation to the object of their research' (ibid.). Minkkinen points us to an understanding of 'critical' that echoes the association I make with Foucault's 'curiosity'; he uses Habermas to speak of being 'critical' as 'self-reflection', a 'concern with knowledge' that is 'emancipatory':

'The methodological frame which settles the meaning of the validity of this category of critical statements can be explained in terms of the notion of self-reflection. This frees the subject from dependence on hypostatized forces. Self-reflection is influenced by an emancipatory concern with knowledge (...) (Habermas 1966).

Thus for my purposes, the ‘critical’ in ‘critical legal education’ refers to a concern with nurturing ‘curiosity’ and ‘self-reflection’ – to developing a ‘critical *attitude*’ to what one studies and the questions one asks of it.

My interest in the way in which the ‘art of critique’ is (not) nurtured in law schools began in 2007 when I started work on an AHRC-sponsored project on legal research methodologies in European Union and International Law with two colleagues at the University of Nottingham.¹ The impetus for the project, initiated by Professor Hervey, was a general experience that something was ‘missing’ from these disciplines – in that students did not reflect on their research: on where it fits in with the discipline, what kinds of research questions they think are interesting to ask, what theoretical perspective best supports their way of thinking about their project, and so on. They had no awareness, in other words, of methodology. Moreover, there was not sufficient guidance available for the more curious amongst them that were in fact interested in reflecting on these issues. It was also our experience that staff within law schools (the researchers and the educators) were often themselves, having been nurtured in a dominantly doctrinal environment, at a loss as to how to explain to students not only the importance of these questions but also how to explain ‘methodology’.

In order to substantiate our experiences, we ran two workshops for PhD students (attended mainly by those beginning or at the early stages of study) and consulted numerous scholars across ten partner institutions on a set of materials that eventually were published in a book, entitled *Research Methodologies in EU and International Law* (Cryer, Hervey and & Sokhi-Bulley 2011). What we found over the course of the process was interesting: first, some academic staff either did not know about, or had little interest in knowing about, methodology. Second, most PhD students were beginning their research without any knowledge of methodology or the opportunity to think about the practice of research and its theoretical implications. Third, and most interestingly for us, the feedback on the workshops was extremely positive, with students commenting, for instance, that (Cryer, Hervey and & Sokhi-Bulley 2008, p. 48):

‘This workshop has turned me into a theorist
 ‘My assumptions about theories/methodologies have changed’
 ‘[The workshop]made me focus on methods and theory’

This latter point reveals that a majority of students, once exposed to different perspectives, approaches or what I am calling ‘alternative methodologies’, *are* actually interested in learning about them. The point is that many did not understand, first, what a methodology is – are there different types of methodologies

1 Professor Tamara Hervey, Jean Monnet Professor of European Union Law, University of Sheffield; Professor Robert Cryer, Professor of International and criminal Law, University of Birmingham. For a background to the project, see Cryer, Hervey & Sokhi-Bulley 2011. It is fair to say that my personal concern here (and indeed that of the project at the time) is law schools in the United Kingdom only.

and how do you 'choose' your methodology? How, moreover, do you articulate your methodology? Second, why is methodology important? That is, many see it as an added complication to their research projects, rather than a necessary part of good research.

Perhaps a reason explaining why students feel this way is that in most law schools law is taught in a traditionally doctrinal sense.² Subjects such as legal theory, legal philosophy or jurisprudence, are typically considered 'peripheral subjects' (Kennedy 2004, p. 37) – as opposed to the 'core subjects' that make up qualifying law degrees (such as Land Law, Criminal Law and European Union Law). This is relevant as 'methodology' has significant connotations of 'theory', as I discuss below.

Another reason may be that there is no real accepted canon of 'approaches to law' or 'legal methodologies'. This is in stark contrast to disciplines such as International Relations or Politics, where texts such as Scott Burchill et al.'s *Theories of International Relations* outline a series of typically used approaches to the subject that students are taught to become familiar with (from, Realism, Liberalism and Constructivism to Critical Theory, Feminism and Poststructuralism).³ The classic 'jurisprudence' textbook has assumed that 'legal positivism' is 'the "properly" legal perspective',⁴ focusing on this (and on natural law theories) with perhaps a couple of chapters at the end on 'other' approaches (this, as I explain below, is what I call 'alternative methodologies'). For instance, Penner et al.'s *Introduction to Jurisprudence and Legal Theory* has a chapter on Foucault and law, a chapter on feminism and law, and a chapter on autopoiesis. McCoubrey and White's *Textbooks on Jurisprudence* includes an all-encompassing last chapter on 'postmodern legal theory'.⁵ Ratnapala offers an interesting arrangement in his book, *Jurisprudence*, splitting Part 1 (Law as it is) from the remainder of the book, which examines what the law ought to be (Part 2: Law and morality; Part 3: Social dimensions of law; Part 4: rights and justice). Others, such as the excellent *Critical Jurisprudence* by Douzinas and Gearey would simply be considered 'too alternative' by some for its story-telling, CLS style.

The term 'jurisprudence' is often used synonymously with legal *theory* – it thus 'consists of scientific and philosophical investigations of the social phenomenon of law and of justice'.⁶ Douzinas and Gearey, however, go further and describe 'jurisprudence' as 'the task of uncovering and pronouncing the truth about law'

- 2 This article uses 'doctrinal' and 'legal positivism' synonymously. I make this association since legal positivism, as a methodology, is interested in questions concerning the *description* and explanation of law as it is, in empirical *observation*. For a similar understanding of the relation between the two terms, see Cryer, Hervey & Sokhi-Bulley 2011, p. 38 and Minkkinen 2013, p. 123. For an interesting alternative analysis of the meaning and value of 'doctrinal' methodology, see Hutchinson 2013, p. 7.
- 3 Burchill et al. 2009. See also Dunne, Kurki & Smith 2013 and Steans et al. 2010.
- 4 Minkkinen 2013, p. 119, who takes this from Hart. See further Hart 2012.
- 5 McCoubrey & White 1999. See also the revised and updated version, Penner & Melissaris 2012.
- 6 Ratnapala 2009, p. 3. As Ratnapala also highlights, 'jurisprudence' can of course also be used to 'refer to the interpretation of the law given by a court' (p. 3).

(Douzinas & Gearey 2005, p. 5). This task, they argue, has been approached both internally and externally; internal approaches rely on the perspective of the judge or lawyer. External theories, by contrast, look for a wider non-legal explanatory context for the 'facts' expounded by the judges and lawyers; they look for a socio-logical and socio-legal context. External theories, they argue, have been 'demoted' in the Law School curriculum, as 'legal positivism has been the dominant and typically modernist internal approach' (ibid.). This has led, they argue, to the 'moral poverty of the jurisprudence of the twentieth century' (ibid.). I argue that the external approaches, or what I am calling 'alternative' (i.e., to legal positivism) approaches to law are necessary so that we, and our students, might discover alternative truths about the law and about society.

2.2 *Methodology versus theory versus method?*

Talking of canons and textbooks as tools for students raises another question: are we talking about *theory* or about *methodology*? And what about *method*? There has been a burgeoning of late in books on legal *methods* – and we certainly teach courses on law and method to our students. 'Methodology' undoubtedly has theoretical connotations. So, for instance, a legal positivist methodology will use ideas from the 'theory' of legal positivism – that all law is created and laid down ('posited') by a law-making authority, that the validity of a rule of law lies in its formal legal status (not its relation to morality or other external validating factors – i.e., law is self-referential), that there is a concern with social standards that are recognized as authoritative: judicial decisions, legislation, custom.⁷ This theoretical perspective will then inform the types of questions that a legal positivist will be interested in asking – questions such as, What is the law? What does the social situation look like? And it also influences what they will *not* ask: What ought the law to be? Or, how is it the way it is – taking into account social, political and philosophical factors? In the same way, a postcolonial methodology will use ideas from postcolonial theory – such as challenging the taken for granted assumptions and naturalized categories of knowledge that are produced by the promotion of Western values.⁸ The types of generalized questions that are relevant for a post-colonial critique might therefore be: How does the law subordinate or silence peoples from the Global 'South' and 'Third' World? What violences are hidden by law's claim to race or culture neutrality?

My point here is that methodology is not about 'high theory' – it is not about 'being a theorist'. It is, rather, about using the *tools* that theory, or different theories, provide to enable one to determine which are the right questions to ask for the particular project one is interested in. So, for instance, one does not need to 'be a Foucauldian' to use ideas of disciplinary power or governmentality to study an aspect of human rights law. Nor does one have to be loyal to only one particular theoretical, or methodological, perspective. It is of course possible to think like

7 See the description of 'legal positivism' in Cryer, Hervey & Sokhi-Bulley 2011, p. 37-39.

8 For an example of 'applying' postcolonial theory to human rights, see Doty 1996; Mutua 2002; Rajagopal 2003.

a poststructural feminist or to have a methodology that shows you think like a legal positivist, a feminist and a Marxist – though these positions raise inevitable tensions that must be negotiated by the researcher or student. There is the basic and obvious point that one must be true to the idea, to the theory. But I suggest that different theories, or approaches, collectively provide a *toolbox of skills* that we can take from (as researchers) and teach our students to use (as educators). This is ‘not’, as Peters states, ‘a “shopping-mall approach to ‘method’” but a precondition for informed criticism’.⁹ There is also a danger, when trying to teach methodology, with using the term ‘theory’. Experience shows that it scares off students (and in some cases the educators also!). They associate the term with high theory/philosophy/jurisprudence – and not with a toolbox of ideas that provides them with the skills they need to be successful lawyers.

It is worth noting that as well as a distinction between methodology and theory, a distinction can also be made between methodology and ‘method’. A method has empirical and sociological connotations – so, is the method a qualitative or quantitative analysis? What methods of data collection are used – documentary analysis, case studies, observation, interviews, for example? It is essentially about *what you do* in a project, as opposed to *how you think it*.¹⁰ Most, if not all, universities will teach courses on ‘research *methods*’. Here students usually learn about qualitative methods – for example, how to conduct (expert) interviews. They would engage in questions such as ‘What is qualitative interviewing?’, ‘Why interview’ and ‘What are the purposes of interviews’, ‘What kinds of information can we obtain from interviews’, ‘How to prepare an interview guide’, ‘How to select interviewees’, ‘How to carry out data collection and interview documentation’, etc.¹¹ They also learn about quantitative methods – such as surveys and questionnaires, using analytic tools such as cross-tabs, correlation and regression and SPSS.¹²

Interestingly, there has been a burgeoning of late in law books on method. Mike McConville and Wing Hong Chui’s *Research Methods for Law* concentrates on making ‘available methods of research – legalistic, empirical, comparative and theoretical’ accessible to law students (McConville & Chui 2007, p. 5); each chapter outlines a particular research ‘method’ within law, and helpfully and interestingly uses actual research projects as examples to illustrate how the method can be used to conduct legal research (p. 7). ‘Method’ and ‘methodology’ appear to be used interchangeably. Dawn Watkins and Mandy Burton’s *Research Methods in Law* addresses the question of method versus methodology directly – and asserts that whilst the contributors may not agree on the precise and different definition of these terms, ‘all of them agree that establishing an appropriate theoretical

9 Peters 2001, p. 37, quoting Koskenniemi.

10 See further Cryer, Hervey & Sokhi-Bulley 2011 and also Watkins & Burton 2013, p. 2-4.

11 ‘Techniques and Methods in Law and the Social Sciences’, LAW7002, March-May 2013 – compulsory module, LL.M in Law and Governance, Queen’s University Belfast.

12 Ibid. SPSS, known previously as Statistical Package for the Social Sciences, is the most commonly used programme for the statistical analysis. For a standard guide to using SPSS written for social scientists, see Acton et al 2009.

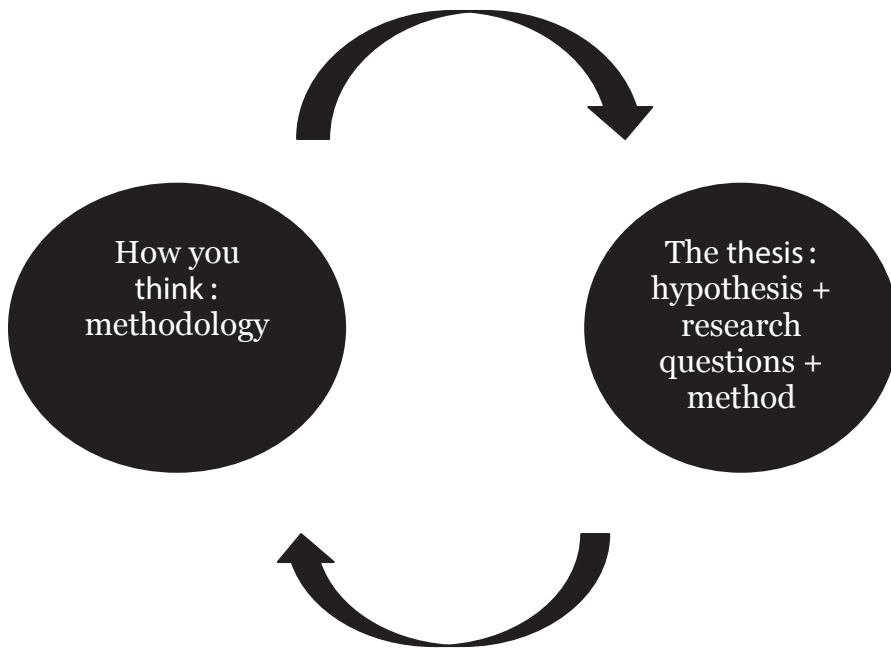
basis for a research project is as important as determining the appropriate method/s for carrying out the research' (Watkins & Burton 2013, p. 2-3). The book offers a 'challenge [to] readers who are intending to take a pure, doctrinal approach to their research to provide a justification for the reason for doing so' (p. 4). Whether doctoral research could and ought to be underpinned by elements of social sciences is considered by the contributors in Mark Van Hoecke's *Methodologies of Legal Research: What Kind of Discipline for What Kind of Method?* Should legal doctrine be merged with the social sciences? Van Hoecke suggests that Law should use these disciplines but not try to integrate them, so as to avoid problems of epistemology, of methodology and of research skills (Van Hoecke 2013, p. xiii). Whilst I disagree with this, I do agree with the self-reflexive sentiment of Roger Brownsword's question of 'what am I doing as a legal scholar in contract law?' in his chapter (Brownsword 2013, p. 133). It is crucial that 'the researcher is reminded of the need to be *reflective and reflexive* during the research process and to question whether the chosen methodology is the most appropriate for researching the chosen topic (McConville & Chui 2007, p. 3).

I argue that methodology is therefore about 'how to think' a project. This is different to how to think *about* a project (method). I interpret methodology as a way of thinking, an *attitude* – it is therefore not as much about theory or method but about an approach, a perspective, or a lens through which to see a project. The reason the methodology is so vital is that it influences the hypothesis, research questions and sources used in a project. Arriving at one's research questions and 'deciding upon' a methodology is thus a reflexive and circular process, as the diagram below illustrates:¹³

Methodology thus influences the thesis – i.e., the hypothesis, research questions *and method* – which in turn directly influences the *critical discussion*, the *sources* that will be used, the *argument and the structure* of a project. It is therefore vital that as educators we teach our students about methodology. Research is now an integral part of the curriculum for undergraduates and postgraduates alike, with coursework becoming an increasingly popular form of assessment (McConville & Chui 2007, p. 2). Students at all levels require methodological skills for research. Methodology is the link from having a *topic* for a dissertation and turning that topic into a *thesis* by identifying the right questions for that person's interest, personality, and available sources. I am often asked in the talk that I refer to at the start of this paper, 'how do I *choose* a methodology?' My starting point in answer to this is that methodology stems from a personal viewpoint or attitude – so, it is not a 'choice' in the sense that you simply 'add in and stir' any methodology to a project. The point I then make is that we all, obviously, think differently and so will be interested in different questions regarding the same thing. These different personal attitudes should be acknowledged (as *methodology*) and given a name in research projects. Most of the time students are not aware that, on the one hand, their attitude or ability to choose a methodology is impaired by having

13 See also Cryer, Hervey & Sokhi-Bulley 2011, p. 8-10.

Figure 1 *Deciding upon a methodology*



been disciplined and trained in a legal positivist tradition only and, on the other hand that their 'chosen' approach, if doctrinal, should be labelled legal positivist (it is fair to say that the majority of undergraduate and LLM-level dissertations are 'black-letter'; McConville & Chui 2007, p. 4). This label is useful and necessary to determine as it will help them think critically about the types of questions they are interested in asking. Similarly, if they have enjoyed reading a feminist scholar let's say, they might benefit from being encouraged to use one of the array of feminist perspectives to think their ideas and arrive at suitable research questions. As Ann Peters states, 'methodological explicitness is preferable because it contributes to a transparency of argument' (Peters 2001, p. 37).

Students also ask whether there is more than one type of methodology, and if so, how many? In the *Research Methodologies* book, we present what we call 'the list' (Cryer, Hervey & Sokhi-Bulley 2011, p. 10) – it is by no means an exhaustive list but one that we felt reflected the dominant and also what I call in this paper the 'alternative' methodological perspectives. We called the former the 'Main Jurisprudential Approaches' – i.e., legal positivism and natural law perspectives. The latter were called 'Extensions and Negations', which were split into two parts: first, the 'Modern and Critical Approaches' – which included governance, Marxism, critical theory, feminist perspectives, postcolonial theory, for instance and

second, the 'law and' approaches – which included for example, law and geography, law and international relations, and law and economics (ibid.).

As the book explains, 'the list' was arrived at after much deliberation and agonizing (p. 11). It also acknowledges areas that are missing from the list – notably comparative law. This, it was decided, is arguably a subject in itself, with its own theories and methods (p. 12).¹⁴ We drew on various sources for inspiration, since there is something approaching an 'accepted canon' of international law theories (such as Steven Ratner and Anne-Marie Slaughter's *The Methods of International Law*.¹⁵ Ratner and Slaughter define 'method' as 'the application of a conceptual apparatus or framework – a theory of international law – to the concrete problems faced by the international community' (Ratner & Slaughter 2004, p. 3). This is what we understand in the book as 'methodology', 'theory' or 'approach'. Their list (legal positivism; New Haven school; international legal process; critical legal studies; international law and international relations; feminist jurisprudence; Third World approaches to international law; law and economics) has a similar starting point to the list in the book.

The 'extensions and negations' were so-labelled since they extend or depart from the traditional approaches. They are, in other words, 'alternative'. However, part of what I want to stress in this paper is that this does not make these 'other' approaches to (EU or international) law any less useful to students (or indeed researchers) than the mainstream or traditional approaches. A mainstream/alternative dichotomy suggests that that which comes under 'alternative' is lesser, or inferior, or lacking in importance. To use Kennedy's word, it is merely 'peripheral'. However, I argue that these alternative approaches present us with the opportunity of alternative *truths*. They allow us to change the research question of a project depending upon the lens – i.e., the perspective, or methodology – used. I illustrate this below using an example exercise asked of our students. Before that, let me outline an example of an alternative methodology that I have personally found useful, and why.

2.3 Governmentality as an 'alternative methodology'

A perhaps awkward neologism, 'governmentality' is a term coined by Foucault in his later work to explain the power relations that make individuals govern(ment)able and thereby allow for the exercise of a regulatory, or governing, power (Foucault 2002a, p. 201). Thus,

'This word [government] must be allowed the very broad meaning it had in the sixteenth century. "Government" did not refer only to political structures or to the management of states; rather, it designated the way in which the *conduct* of individuals or of groups might be directed – the government of children, of souls, of communities, of the sick (...) *To govern, in this sense, is to*

14 See further Bell 2013, p. 155.

15 . For another overview of 'approaches' to international law, see also Peters 2001.

control the possible field of action of others' (Foucault 2002b, p.341; emphasis added).

Understood in this perhaps literal manner (the verb 'to govern' can literally mean 'to control or influence'; Concise Oxford Dictionary 1999), government refers to the 'conduct of conduct' (Gordon 1991, p. 1-2); a form of activity or practice that aims to shape, guide or affect the conduct of some person or persons. In a lecture given at the Collège de France in 1978, posthumously given the title 'Governmentality',¹⁶ Foucault presents his most concise definition of the term. He explains that 'governmentality' means three things (Foucault 2002a, p. 219-220): first, 'the *ensemble* formed by the *institutions, procedures, analyses, reflections, calculations and tactics* that allow the exercise of this very specific albeit complex form of power, which has as its target population'. Second, governmentality refers to 'the tendency that, over a long period and throughout the West, has steadily led to the pre-eminence over all other forms (sovereignty, discipline and so on) of this type of power, which may be termed "government"'. Third, governmentality is the (result of the) process by which the state gradually 'becomes governmentalized'.

For the purposes of this paper, it is important to understand that 'governmentality' can be understood as *both* the *process* of government (that is, as an 'art of government' itself; Foucault 2007, p. 205) and as a *methodology* (that is, as a 'rationality of government' – a way of thinking about the practice of government, and hence of whom or what is being governed, what governing is, whom or what can govern, and so forth; p. 106). It is a 'govern/mentality' (Barron 2005, p. 984). I describe governmentality as a methodology to understand various practices and processes in law. There is a large and growing number of scholars who use a governmentality perspective to understand the ways in which technologies of government operate – for instance in the context of crime control (Garland 1997, p. 173; Rose 2000, p. 321),¹⁷ healthcare (Rose 2007), immigration and asylum (Bigo 2007, p. 63; Darling 2011, p. 263; Inda 2006), e-Government (Morrison 2010, p. 551), and new governance agencies and human rights (Sokhi-Bulley 2011, p. 139-156). What these contributions have in common is the use of governmentality as a methodology – not simply as a 'theory' (which it is not) but as a *tool* with which to better understand the 'thing' (e.g., interrogating the 1999 Immigration and Asylum Act and subsequent developments and presenting the UK border as a site of domestic politics – (Darling 2011); describing rights as technologies of governmentality that govern the global virtuous identity of the EU as a rights actor (Sokhi-Bulley 2011) that they are critiquing. Governmentality is thus a 'creative' concept and a creative methodology – meaning it is a flexible, open-ended and above all *useful* tool. It is essentially about satisfying that 'curiosity' – to 'find what surrounds us as strange and odd (...) to look at the same things in a different way'. It helps us to challenge typical conceptions of gover-

16 Foucault 2002a. Also presented by Foucault as the fourth lecture in the course *Security, Territory, Population* (Foucault 2007, p. 87).

17 See also Rose and Miller (2008) on 'governing communities'.

nment as implying state power, sovereignty or hierarchy and examining instead the various technologies and tactics, the often mundane processes, through which power circulates in a heterarchical fashion.

Moreover, recent academic conferences have been built around the central Foucauldian themes of biopower and genealogy – note for example, the Law Culture and the Humanities annual conference of 2013, themed ‘Sculpting the Human: Law, culture and biopolitics’;¹⁸ and, the Critical Legal Conference of 2009, themed ‘Genealogies: Excavating modernities’.¹⁹ This illustrates that the label ‘alternative’ is perhaps limited in its appreciation of the type of literature that *does* engage with the less mainstream approaches to law – although the question still remains of how we communicate these to our students and this is what I come on to in the next section.

3 Methodology as skill

3.1 Methodology and transferrable skills

Thus far I have been trying to show that methodology is not just about theory or about method – it is also, and crucially, about a critical attitude. This attitude can be nurtured and disciplined – it can be taught and learned as a *skill*. Students nowadays want to know what they need to do to gain their degree so that they can go on and practice law. They respond to the language of ‘skills’. I teach on a module called *Legal Theory* and face a constant challenge of having to explain the validity of theory to students, the majority of whom want to qualify as lawyers and practice. It means marketing ‘theory’ as a ‘tool’ – as a ‘skill’. Similarly, I teach ‘methodologies’ as one of three ‘skills sessions’ on the main human rights module for postgraduates studying on the LLM in Human Rights. Without these (albeit brief) sessions, postgraduate students otherwise have no ‘formal’ exposure to methodologies before going on to write their end of year dissertation.

I use the terminology ‘marketing as skills’ slightly uneasily because of its management-speak connotations, but this is precisely what we are doing. Programmes such as the Personal Development Portfolio at Queen’s ask students in their third and final year of undergraduate studies to define what they understand by ‘transferrable skills’ and whether they see ‘critical analysis’ or ‘critique’ as such a skill.²⁰ It is interesting to observe that students often do not realize the skills they have learnt over the course of their law degree – both research skills (for example, how to find and cite a case; how to reference correctly; presentation skills) and personal development skills (for example, time management; punctuality; group or

18 <http://www.law.syr.edu/academics/centers/lch/conference.html> (accessed 15 June 2013).

19 <http://lsolum.typepad.com/legaltheory/2009/05/conference-announcement-critical-legal-conference-at-leicester.html> (accessed 15 June 2013).

20 <http://www.law.qub.ac.uk/schools/SchoolofLaw/Education/Undergraduates/PersonalDevelopmentPlanning/> (accessed 15 June 2013).

teamwork).²¹ It is perhaps relatively easy for them to see how these might translate, or 'transfer', to an employment context. What they do not generally see with as much ease is how learning about different legal theories, or methodologies, might help them in the workplace.

A 'skill' is literally defined as 'the ability to do something well; expertise'.²² By learning about (alternative) methodologies, students are becoming experts in how to (better) understand law. They are developing their conceptual (ideas), creative (originality) and critical (evaluation) skills. They are thus gaining the ability to challenge assumptions about the law; to consider alternative questions on a topic of law; they are therefore learning the ability to create alternative truths. Alternative methodologies provide a toolbox of approaches to a problem/research question – the 'tool' may be governmentality, or feminism, or Marxism, etc. The point is that the problem or research question can be approached using tools *other than* the mainstream approaches. And students should be exposed to all the tools in the toolbox – so they might decide for themselves which is the most appropriate for how they think. Legal research methodologies should thus be taught as a skills or tools within 'a *tool-box* which others can rummage through to find a tool they can use however they wish in their own area' so that our students might be 'users, not readers'.²³

The question of how this might be useful to the practicing lawyer still remains. Many students view 'law as craft', where 'practical professionalism' is seen as an alternative to adopting an external academic discipline (e.g., economics, sociology, psychology or philosophy; Dagan & Kreitner 2011, p. 671, 677, 689-690). Here I suggest that methodology *is* practice – as a (critical) attitude, it will influence how you practice the law. How well you are able to identify not only what the law is but to challenge its assumptions and to interrogate them. It means to take on the challenge of not becoming the docile (if still successful) lawyer, as I will explain further below.

3.2 *The critical attitude: searching for alternative truths*

The students at the Research Methods workshops were fascinated to discover how the end product of a project can change depending on the questions you ask, so, depending on your methodology – that you can choose not be governed by what I'm calling traditional or black-letter approaches. One of the exercises during the workshops was to draft a potential outline for a dissertation topic. The students were asked to identify their research questions and their approach/perspective /methodology. They were then asked to swap 'thinking hats' (De Bono 1992) and reconceptualise their projects from an entirely different perspec-

21 Kennedy (2004, p. 31) gives a summary of 'simple but important things' (i.e., skills) that law students learn.

22 *Oxford English Dictionaries Online*: <http://oxforddictionaries.com/definition/english/skill?q=skill> (accessed 2 July 2013).

23 Foucault 1994, p. 523-524, commenting on his work as 'fragments' to be used as part of a 'critical attitude'.

tive to show how the thesis would look completely different (Cryer, Hervey & Sokhi-Bulley 2008, p. 49). So, for instance, if you are doing a legal positivist analysis into how human rights discourse has evolved in the European Union, for instance, how do your research questions change if you adopt a postcolonial approach – where you are suddenly interested not in questions about what the law is and the rule of law but in questions of genealogy, of power relations, of ‘otherness’.

We conducted a similar exercise with our final year undergraduates at my institution – we asked them to think about writing a feature piece on the ‘London Riots’ of August 2012, identifying key issues, which we all agreed on as being: race, class, poverty, male, youth and crime. We then asked them to write their piece from a legal positivist perspective, a CRT perspective, a feminist perspective and a Foucauldian perspective and to identify *how the approach influences the questions you ask, which influences your research project as a whole*. That is, the perspective influences the effect of the analysis – what you are trying to show or prove in the project. So, for instance, looking at the riots from a legal positivist perspective would necessitate asking: What law applies? What laws were violated? What decisions did the courts make? The *effect* of this type of questioning, of this type of methodology is to then make a statement that qualifies these questions – for example, that the riots resulted in the criminalization of this behaviour and in some cases the handing out of disproportionate criminal sentences (note the case of *R v Blackshaw*).²⁴ Examining the riots from a feminist perspective might prompt questions such as: Did the riots reflect a gender issue? Did they normalize male violence (women being portrayed as the ‘broom brigade’ and the tea servers)? Did they stereotype the mothers of the delinquent youth as ‘bad parents’? The *effect* of this type of questioning, of this type of methodology, is to be able to state, for instance, that the riots *did* normalize male violence.

The point is that different perspectives (or methodologies) on a problem/topic create ‘alternative truths’ about them because they tell the same story in a different way. Many of the students were taken aback by how the story of the riots changed depending on the perspective used. It is an important skill, this article argues, to be able to look at the same things in a different way, in an alternative way, in a more critical way.

3.3 *Moving beyond the docile, successful lawyer*

Matthew Ball comments that although it is often argued that law schools provide a negative, competitive, and conservative environment for students, pushing them towards self-interested, vocational concerns, this is nevertheless a productive process (Ball 2012, p. 103). Using Foucault’s work on the government of the self, he argues that far from law students being repressed, they engage in a self-fashioning process that allows them to act effectively as legal personae.

24 *R v Blackshaw and Others* [2011] EWCA Crim 2312 saw the courts deliver a sentence of 4 years detention to Jordon Blackshaw for ‘incitement by the use of Facebook’.

So, perhaps I am wrongly concerned with importance of teaching *critical* legal education. Perhaps if the students govern themselves to become successful legal practitioners without reading Foucault or Derrida or Habermas, for instance, we have been successful educators. My problem with this is the resultant docility that governmentality within law schools engenders: the *docile, successful lawyer* that has not been encouraged to 'think about the same things in a different way' or, then in turn, to engage in critique and to resist the dominant paradigm. An awareness of methodology can be in itself a form of 'resistance': Kennedy (2004) uses this idea to argue that educating students on what he calls 'theory' can be used to resist the reproduction of a hierarchy (that already exists in legal education) in the practice of law and in society.

4 Conclusion

What does 'resistance' mean in this context? It means *behaving* differently – a 'counter-conduct', or '*struggle* against the processes implemented for conducting others' (Foucault 2007, p. 201; my emphasis). These processes include the way in which legal education operates – often without exposing students to critical methodologies that would provide them with the skills to view (legal) issues, to solve (legal) problems *differently*. We need a sort of 'revolt of conduct' (ibid.) in legal education, such that courses on theory and methodology are not relegated to the periphery; such that methodology is seen as an attitude and perhaps more crucially in educational terms as a skill. To echo Hanoch Dagan and Roy Kreitner, 'the implication would be that while people in the law school could do anything in the way of scholarship, they would also have to speak legal theory if not with native proficiency then at least as a second language' (Dagan & Kreitner 2011, p. 10). Law Schools should aspire to teach legal theory as methodology and as skill. Classes on legal research methods should discuss methodology as an attitude; they should feature alternative methodologies and encourage a critical attitude in students. McConville and Chui alert us to 'evidence that law schools in the United Kingdom, the United States and elsewhere are offering new postgraduate programmes (such as socio-legal studies, feminist legal studies, critical legal studies and new approaches to international law) that encourage an interdisciplinary approach to the study of law' (McConville & Chui 2007, p. 5). This is of course an example of positive developments in the area of critical legal education and should be encouraged.

What will this resistance achieve? It will hopefully produce better quality work from our students, as they exercise their conceptual, critical and creative skills. It will produce a less docile subject – the student who has the knowledge, who has been 'emancipated' by that knowledge (to use Habermas' wording) and who can therefore say that she does not want to be conditioned to think *like that*. The student that is not afraid to engage in 'a different form of conduct (...) wanting to be conducted differently, by other leaders (*conducteurs*) and other shepherds, towards other objectives and forms of salvation and through other procedures

and methods' (Foucault 2007, p. 194-195). These are the alterative procedures, or methodologies, that depart from legal positivism and are all too often removed from legal education.

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Empirical Facts: A Rationale for Expanding Lawyers' Methodological Expertise^{*}

Terry Hutchinson

Legal academics focus on the study of the nature of legal rules and legal reasoning. This emphasis on rules has the potential to obscure the importance of facts in the determination of the law. Judges use general facts about the world in developing and interpreting the law in addition to the facts they use that are specific to the dispute between the parties. Practicing lawyers present versions of the facts as truth in arguing their client's case in court. Facts also provide an evidence base for lawmakers to formulate policy and draft new law and rules.

'Evidence based' practice is used widely in the fields of medicine and business. This article describes the evidence-based practice paradigm. It argues that facts about society gleaned from social research form a legitimate evidence base that is important for legislative reform. An evidence-based approach seems an obvious step in formulating effective laws and providing legal solutions to social problems (Head 2010). It should be used to assist legislators in developing and ensuring well-founded public policies leading to sound legislation. However, in law reform, the evidence base is often overwhelmed by populist perceptions and political ideology. A recent legislative amendment to youth justice sentencing options provides a pertinent case study where the evidence base is being disregarded. This article argues that there would be more likelihood that 'good' law, that is law that is just and that brings about an intended outcome, would be achieved if the law is based on identified 'facts' about society and the way it operates. Secondly, it argues that empirical research and research about 'facts' in society are important factors in assisting judges in the development of authoritative jurisprudence. In doing so, this article highlights the use of the evidence base in cases in the High Court of Australia.

This article argues that there is a need for those lawyers who play a part in law reform (legislators and those involved in the law reform process) and for those who play a part in formulating policy-based common law rules (judges and practitioners) to know more about how facts are established in the social sciences. For this reason, law students need enhanced training in interdisciplinary and empirical methods in order to tap into the ever growing body of evidence from social research. Law students need empirical methodologies skills and awareness to fully prepare for legal practice and for the many influential roles law graduates have as advocates, judges, practitioners, legislators, researchers and policy makers.

^{*} Melody Martin, Aaron Walker and Josh Caeiro (QUT Faculty of Law) were the research assistants on this article. I also wish to acknowledge the assistance of Professor Charles Sampford.

1 The paradigm of evidence-based practice and law

The modern concept of evidence-based practice originated within the health services sector. The British physician Archie Cochrane published his *Effectiveness and Efficiency. Random Reflections on Health Services* in 1972, but it was not until the 1990s that this theory of practice gained more general acceptance (Hjorland 2011). The paradigm of evidence-based practice stipulates that decisions should be based on research-based knowledge collected in a systematic way using recognized scientific standards with research overviews synthesizing knowledge from multiple primary studies (ibid.). Is this movement affecting legal practice, public policy and law?

Within the legal academy, particularly in the United States and Canada, the last three decades have witnessed a growing trend towards the use of empirical research (Ellickson 2000; Shanahan 2006). In addition, there is a growing impetus for evidence based practice from disciplines aligned with law – the social scientists, criminologists and statisticians. In the US, there are signs that the legal academy is trying to enhance its expertise, for example the George Mason University School of Law is offering law professors special workshops in empirical methods and the Society for Empirical Legal Studies based at Cornell University encourages empirical methodological expertise amongst legal academics through its successful conferences each year. These meetings are aimed at highlighting recent empirical research on the legal profession, courts and legal practice, and at the same time, encouraging and honing empirical methodological expertise amongst legal academics, through its *Journal of Empirical Legal Studies* launched in 2004. ¹ The situation within legal academia in Australia also reflects this change to a positive attitude towards empirical methods, spurred on by the growth in publicly funded interdisciplinary research emanating from universities. Studies demonstrate a gradual shift to the use of non-doctrinal methods in association with the traditional doctrinal work (Hutchinson & Duncan 2012). In addition, there is the on-going work of the Law and Society and other interdisciplinary associations in all jurisdictions.² In the UK, the tensions within the policy development arena are evident with the 2006 Nuffield Report signalling a movement towards gathering improved data and ensuring training in empirical methods within the academy (Genn, Partington & Wheeler 2006). Despite this, the Legal Services Research Centre (LSRC), an independent research division of the Legal Services Commission, which was established to inform legal aid policy and the implementation of reform through quantitative and qualitative empirical research, was closed in 2013.

The take-up of the use of the evidence base within the Australian legal profession is difficult to measure. Lawyers seem not to be embracing the new evidence-based

1 See the website at <http://www.lawschool.cornell.edu/sels/>.

2 The Law and Society Association of Australia and New Zealand, <http://www.lsaanz.org/>; Australian and New Zealand Society of Criminology, <http://www.anzsoc.org/>; and their equivalents in the US, UK and Europe.

paradigm to the same extent as other professions. Raschlinski argues that the explanation for this difference is that Law lacks the same 'uniformity of purpose' as other disciplines:

'It is often politics by other means that sorts winners and losers, rather than right and wrong, thereby clouding the normative environment. What is accepted fact in medicine and business is contestable in law. Law's political nature does not render empirical testing of widely held myths a hopeless misadventure but complicates the hope (and the value) of creating an evidence-based law' (Rachlinski 2010-2011, p. 901).

Unlike medicine where there is a clear goal of providing 'a positive outcome for the patient's health', or business, where success is judged by the 'bottom line', Rachlinski argues that Law lacks 'a unifying, organizing principle' (p. 918). However, in an argument reminiscent of Peter Ziegler's assertion of the 'non-existent legal paradigm' (Ziegler 1988, p. 569), efforts to define Law's purpose 'lead only to greater complexity' and 'conflicting purpose' (Rachlinski 2010-2011, p. 901). He refers to the 'conflicting themes' in the various areas of law, so that tort and contract law, for example, aim for efficiency, but to some degree the aim is also towards fairness for the parties involved, and criminal law needs to balance the rights of the accused 'with society's broader need to control crime' (ibid.). But surely, as Rachlinski suggests, the point for Law is 'to create better law-law informed by reality' (p. 910).

2 The importance of the social evidence base in developing law

Catherine Althaus, Peter Bridgman and Glyn Davis have written an influential text on policy research in Australia (Althaus, Bridgman & Davis 2007). In outlining the policy change cycle, they highlight the need for extensive research and consultation, and both in Australia and overseas, recognition has been given to the need to bridge the policy/research divide so as to establish 'mechanisms for identifying and plugging key gaps in research knowledge' in order to infuse this information into the formulation of policy (Nutley 2003, p. 20; Nutley, Powell & Davies 2013).

Accordingly, recent Australian history provides numerous examples of governments providing meaningful opportunities for the broader community of interest and non-government policy experts to engage in policy analysis and the formulation of options for reform. In 2008, the Australian left wing Labor government announced a positive stance on evidence-led policy:

'The Government will not adopt overseas models uncritically. We're interested in facts, not fads. But whether it's aged care, vocational education or disability services, Australian policy development should be informed by the best of overseas experience and analysis. In fostering a culture of policy inno-

vation, we should trial new approaches and policy options through small-scale pilot studies. Policy innovation and evidence-based policy making is at the heart of being a reformist government' (Rudd 2008).

However, it seems that more often than not the results of this evidence, produced for example by specially established government enquiries and academic research submitted in response to departmental discussion papers, is not used within policy development. This has led some commentators to question government tactics and query whether governments are only using the inquiries and evidence-gathering processes 'as strategies – to avoid criticism, to be seen to be doing something, to delay action or to divert attention' (Fishwick & Bolitho 2010, p. 176), leading to a growing bank of information which has been labelled by John Lea as 'museums of official discourse' (Lea 2004, p. 184). It would still seem

'that many policy decisions are made in isolation from any real research, and that directions for change, based on anecdotal evidence, are imposed from the top. The community may only be involved at a very late stage through consultation processes designed to justify and legitimise' (Hutchinson 2010, p. 73).

Why is this evidence being ignored? One very influential tool working against evidence-based practice in the formulation of law is anecdote. Politicians, for example, both in Australia and overseas, benefit from highly publicized stories involving violent criminals which allow the conservative parties to rely heavily on a 'tough on crime' stance at every opportunity. One decision by a Parole Board, which in hindsight may have been unwise, can affect the rehabilitation hopes of hundreds. One widely publicized murder by a parolee in Victoria recently has prompted an overall review of the procedures and parole system in that state which will inevitably result in tighter parole requirements (Callinan 2013). Just as in the courts, difficult or unusual or exceptional cases can cause the clarity of the law to be 'obscured by exceptions and strained interpretations', so too unusual and heinous criminal acts can incite public opinion to the point where politicians pass 'bad' laws. Highly publicized incidents can result in unnecessarily harsh or unjust laws, so that for example special offences covering looting during disasters are added to the statute books despite the fact that basic stealing offences already cover all pertinent situations.³

As well as anecdote, governments have a tendency to rely on common wisdom unsupported by scientific research, public perception of what the voters believe and want in the context of a government voted in with a political mandate, cheaper short term options and simplistic solutions. Therefore, many factors other than research evidence shape the policy process including 'prevailing public opinion; political policy events such as elections; changes of ministers and govern-

3 See for example the Criminal Code (Looting in Declared Areas) Amendment Bill 2013 (Qld) following a few incidents which occurred during the Queensland floods.

ments; fiscal constraints and budgets; institutional constraints; policy actors; political power; policy discourse; organizational cultures; agenda setting; one-off events; political economy; and new managerialism' as well as 'penal populism'; the 'politics of law and order' and 'the performance indicators of the State Plan' (Fis-hwick & Bolitho 2010, notes omitted). One recent study has even demonstrated that people ignore numerical facts that they have accepted in another context if the evidence is placed in a political context which conflicts with their political beliefs (Nesbit 2013).⁴ Given this research it is pertinent to ask whether law-making will change when lawyers have more empirical knowledge and skills.

Legislation is certainly enacted that conflicts with the results of social research. One example is the establishment of boot camps for youthful offenders. In Queensland, the *Youth Justice (Boot Camp Orders) and Other Legislation Amendment Act 2012* commenced in January 2013. While boot camps may seem a good option to instil discipline and lead young people towards a more appropriate future path, the research demonstrates that the problems being experienced by many youthful offenders are not amenable to simplistic solutions and that these are not the actual outcomes experienced by many boot camp participants. The weight of social research evidence demonstrates that in the past boot camps for young offenders have not been effective in reducing reoffending. A meta-analysis of 32 robust research studies of militaristic boot camps concluded that 'this common and defining feature of a boot-camp is not effective in reducing post boot-camp offending' (Wison, MacKenzie & Mitchell 2008, p. 3). Similarly, a meta-review of crime reduction programs conducted in Washington State found that boot camps did not reduce recidivism among participants (Drake, Aos & Miller 2009). At the same time other more expensive diversionary programs⁵ with positive evaluations, such as court ordered youth justice conferencing, have been discontinued in order to achieve short term budgetary gains.⁶ There are long term risks involved in ignoring the evidence base in important social areas such as youth justice. These risks include increased youth detention rates, higher costs of detention, net widening, and inequitable impacts on Indigenous youth.

The evidence base of course does not have the answers to all society's difficult problems. Many of the 'wicked' social problems such as Indigenous disadvantage are not amenable to simple solutions. They require complex multi-faceted long-term adjustments to policy. But clear evidence where it exists should not be ignored and a more empirically trained legal profession should surely increase the likelihood of the evidence base being assessed more accurately, given the risks (and costs) involved where clear evidence is ignored in the process of policy formulation and legislation.

4 See also Kahan et al. 2013.

5 \$11.2 million over the next two full financial years in comparison to \$2 million for the new program. Webber 2012, p. 1; *State Budget 2012-13 Service Delivery Statement* 2012, p. 4.

6 There were 1,691 court-ordered youth conferencing referrals last year (as well as 1,246 police referred conferences). Court referred conferencing is reported as having a 98% satisfaction rate. *Childrens Court of Queensland Annual Report 2011-12*, p. 7.

3 The importance of facts in the judicial process

The heart of the lawyers' craft lies in normative reasoning – the formulation, interpretation and application of legal rules. In the common law world, appellate judges are at the pinnacle of that craft in terms of authority and skill. Those judges have the ultimate responsibility for authoritatively determining the interpretation, meaning and effect of statutory and common law texts.

But facts are also important in legal disputes. It is clearly recognized that the particular facts alleged and challenged in the matters that come to court constitute the source of, and the reason for more general rules which are determined through the judges' use of inductive and deductive reasoning. These 'adjudicative facts' are the special or particular facts that need to be established in a particular case and to which legal rules are applied.

In common law systems, the facts are contested. Factual accuracy has been described as the 'paramount' (Frankel 1975, p. 1031), 'fundamental' (Walker 1996, p. 1081), 'principal' (Koehler & Shaviro 1990, p. 247), 'necessary,' (Twining 1989, p. 72;) and 'central' (Weinstein 1966, p. 223) goal of the trial. Advocates present two versions of the facts rather than an objective truth. As a general rule, 'parties to a court proceeding must prove all facts pertinent to their case' (Uniform Evidence Law 2005, 17.1), and there are highly developed rules for determining these adjudicative facts centring on the laws of evidence, procedure and discovery (Heydon & Cross 2013). The courts have been said to exercise a gatekeeping role in keeping out 'junk science' through the use of these rules (Odgers & Richardson 1995). A more 'empirically literate' profession must surely streamline this process.

In addition to adjudicative facts, there are 'empirical facts' (sometimes called 'legislative facts' or 'social facts'). These consist of 'assertions of facts about society, the world and human behaviour' which, in principle, can be tested by 'social science or empirical methodologies' (Burns & Hutchinson 2009, p. 155-156). These facts are neither pure statements of legal principle nor are they adjudicative facts – 'They are assertions used as part of the judicial reasoning process'.⁷ Judges can formally take 'judicial notice' of 'notorious facts' and so 'relieve the parties of the burden of proving them' (Heydon & Cross 2013).⁸ Judicial notice covers matters of such common knowledge that they are rarely contentious, for example indisputable scientific, medical, cultural, and historical facts, including: the laws of physical nature; well-known social habits and usages; and notorious historical events, such as World War II; as well as matters the court may be assumed to know already by virtue of its stature and expertise, such as the validity of legislation put before it (Heydon & Cross 2013, ch. 2).

7 Ibid. See also Burns 2004, p. 215; Burns 2012, p. 317.

8 See *Evidence Act 1995* (Cth) ss 143, 144 and 145.

It can be argued that a judge's view of what is 'common knowledge' affects the interpretations of norms that a judge will find most persuasive. Indeed, views about the world may be as important to the judge's choice of the empirical facts used, as a judge's general philosophy and approach to judicial reasoning is relevant to the way they decide cases.⁹ There have only been a very small number of studies on the use of empirical facts by Australian courts (Mullane 1998; Selway 2001). There has been a limited discussion in relation to their use in the United States (Monahan & Walker 1987; Davis 1942; Davis 1955; Davis 1987). Research of current Australian, United States and United Kingdom case-law demonstrates that judges make statements of empirical facts, with or without the support of social science research, as part of their judicial reasoning. See for example *Cattanach v Melchior* (2003) 199 ALR 131 (wrongful birth), *Woods v Multi-Sport Holdings* (2002) 208 CLR 460 (extra record social scientific material), *St Helens Borough Council v Derbyshire and others* [2007] 3 All ER 81 (working lives of women) and *Stack v Dowden* [2007] 2 All ER 929 (Cohabitation),¹⁰ and *The Queen v Tang* (2008) 237 CLR 1 (slavery).¹¹ Empirical facts may be used in a wide variety of ways by judges in their reasoning. They may be used to set background context, in a rhetorical way to support arguments of legal principle, to assist in the determination or interpretation of adjudicative facts, or as arguments of policy or consequence used in the development of law (Burns 2004). Sometimes statements of empirical fact are subsumed into statements of legal or social values, for example 'statements that refer to enduring community values such as the value of human life' (Burns & Hutchinson 2009, p. 156; Burns 2004, p. 219-221).

There has been an explosion in social science research on law, the justice system, the context in which law operates, the effects law has, and the social and institutional phenomena that statute law and common law seeks to regulate.¹² Nowadays, many of the 'home truths' that might be considered 'notorious facts' are subject to sophisticated social science analysis. Therefore, if this material is available in the community to judges and clients alike, law schools need to ensure that the knowledge and skill of critiquing empirical research is not overlooked in legal training.

4 The need for enhanced training for lawyers in undertaking and critiquing the evidence base

The arguments surrounding the need for lawyers training to be broadened from purely doctrinal research methodologies so as to engage with social research more

9 For example, a judge who protects consumers' ability to challenge standard form contracts might be seen as upholding the principle of consumers' rights or giving recognition to inequality of bargaining power.

10 Burns & Hutchinson 2009, p. 155-156. See also the discussion in Burns 2002, p. 234; Mullane 1998, p. 434.

11 *The Queen v Tang* (2008) 237 CLR 1; (2008) 249 ALR 200; [2008] HCA 39.

12 See the examples in Cane & Kritzer 2010.

meaningfully (Curry-Sumner & Van der Schaaf 2011), have been canvassed in the literature previously (Hutchinson 2008; Bradney 2010). The 2006 UK Nuffield Inquiry noted the crucial importance of empirical research to lawyers and recommended that:

xii. (...) all law departments should consider enhancing the undergraduate curriculum by offering an option on law in society, or offering options with a significant empirical content (...) This would better equip students to deal with a world in which there is an increasing demand for assembling and analysing social data and where, indeed, legal practice requires a wide range of research skills in addition to those of the doctrinal lawyer. Such students should also acquire the technical skills needed to analyse data' (Genn, Partridge & Wheeler 2006, p. 7).

All law graduates would benefit from this training. In the current milieu, legal academics are frequently required to take part in interdisciplinary research teams. Interdisciplinary and multi-faceted methodologies are valued by external granting authorities such as the Australian Research Council. Higher degree research students require exposure to the array of methodologies in order to choose the most appropriate way of progressing their research questions and arguments. Even those researchers using strictly doctrinal methods need to have a facility in assessing the legal statistics and social context.

Law students need this training for legal practice. Training in empirical methods will ensure that practicing lawyers have an enhanced ability to locate, read and critically assess the published results of existing interdisciplinary research and identify obvious error. The process of evaluation involves reading and assessing reports of empirical research across the spectrum of quantitative and qualitative methodologies including for example the use of statistics, surveys, observations of habitual behaviour and interviews with key players. Such skills are required to fully assess the abilities and research presented and more knowledgeable in dealing with expert evidence.

Many law graduates never practice but instead enter government and politics. Training in empirical research methods will enable this group to become more skilled in formulating evidence based policy. In Australia for example, prior to the 2013 federal election, 29 per cent (n=66) federal parliamentarians held law degrees.¹³ Such trends provide even more reason for the law curriculum to include adequate exposure to social research methodologies.

Fulfilling a requirement for law students to graduate having achieved an enhanced knowledge of social research methods and an ability to validly critique the existing evidence base, is problematic. There are an extensive number of quantitative and qualitative social research methods. Any treatment of the vast array of methods within a law degree would necessarily be superficial. Each higher degree

13 This contrasts to a small .452% of the general public who are lawyers. Whitton 2013.

research student, for example, must determine a data collection method best suited to their research question and resources. It would be impossible to cover all the possibilities in sufficient depth within one undergraduate unit in a law degree. It may be necessary to limit the skills developed at undergraduate level to the ability to undertake one very basic quantitative method such as a survey. Is this an effective use of time?

Who will teach the methods courses within the law degree? Few Australian legal academics have dual social science and legal qualifications. There is an on-going discussion even within the social science faculty about the best means of teaching these methods effectively. In June 2012, the Higher Education Academy led with the *Social Sciences Teaching and Learning Summit: Teaching Research Methods* (Hammersley 2012; MacInnes 2012; Garner 2012). The task is not straightforward. Will law students welcome having such material being included in the curriculum? Australian law students (and legal academics) tend to come from a humanities background and favour text-based studies. Many have not completed advanced mathematics in their final years at school. Therefore empirical methods will almost certainly need to be taught by academics from other disciplines. There are resourcing (and cost) issues involved in such service teaching arrangements within the universities.

Where should these skills be included in the law degree? In most jurisdictions the law curriculum is already crowded with core units. In Australia, the core units are known colloquially as 'the Priestley Eleven', being named after the chair of the Law Admissions Consultative Committee. This committee completed a review of the requirements for admission to legal practice in Australia in 1992 and this basic list of subject requirements is still being used throughout Australia.

However, in the Australian law curriculum, the difficulties are not insurmountable, and have been canvassed elsewhere (Burns & Hutchinson 2009; Hutchinson 2008). Including empirical research skills within an established incremental skills training program is one option (Christensen & Kift 2001). Inclusion of such knowledge and skills beginning with a first year tutorial reading and critique module would be sufficient to cover basic skills in reading empirical research papers. Throughout the academic year levels, there are opportunities to examine examples of empirical research evidence when academics are establishing legal context prior to analysing the substantive law. Statistics on prison populations and recidivism are a logical context for a discussion of the rules in relation to sentencing offenders. Statistics on the incidence of divorce are relevant in a family law unit. The incidence of consumer complaints is good background to a discussion of trade practices and fair trading laws. There are case examples which highlight where the courts have accepted and used empirical research results.¹⁴

14 In *Coon and Cox* (1993) 17 Fam LR 692; (1994) FLC 92-464 an Australian family law decision, the Chief Justice of the Family Court compared the scale of the costs of maintaining children, the 'Lee Scale', to the scale more commonly used, the 'Loving Scale'. See general discussion and examples in Hale 2013.

Final year research units provide an additional venue to introduce non-doctrinal research methodologies. Gradually through individually supervised research project units and Masters or higher degree research, students have opportunities to be introduced to the art of writing surveys and the importance of university ethics clearance regulations. The incorporation of discussion of this material is not onerous and involves organizational emphasis and intention rather than the displacement of other substantive material.

There are other avenues. The universities already promote combined degree or dual degree courses such as Law and Justice or Law and Economics. These are available for those who have an interest in pursuing an interdisciplinary perspective. Nevertheless, it is imperative that shifts occur within the law degree curriculum so that there is more recognition of current research realities. The methodologies used in research emanating from the law faculties are expanding beyond purely doctrinal work. The number of higher degree students in law is increasing. There is a corresponding increase in the number of interdisciplinary methods being employed by both academics and students at that level (Hutchinson & Duncan, p. 13-14). The time is ripe for change.

5 Conclusion and further work required

This article has argued that facts gleaned from social research form a legitimate evidence base that should be used to assist legislators in developing and ensuring well-founded public policies and to assist judges in the development of authoritative jurisprudence. This argument is in some respects simplistic because it ignores the complexities involved in the development of a valid evidence base pertinent to any specific jurisdictional legal problem or specific legal dispute, and it also ignores the complexities involved in contested legislative reform underlaid by political reality in democratic government structures. There has not been space to fully address the larger questions concerning why politicians do not use the 'museums of official discourse' effectively within a reasoned law reform process. The assessment of this broader concern must wait for another venue. This article maintains that law graduates need enhanced facility in dealing with non-doctrinal methods so as to fully prepare for legal practice and the many influential roles lawyers have as advocates, judges, practitioners, legislators, researchers and policy makers in modern democracies such as Australia.

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'I'd like to learn what hegemony means'

Teaching International Law from a Critical Angle

Christine E.J. Schwöbel-Patel

'It is a fucking TRADE SCHOOL. You are all there to be trained to think and act exactly the same way as everyone else in the profession, so you can then be a drone in the legal system.' (Tucker Max, excerpt from 'Why You Should Not Go to Law School'¹)

Introduction

International law teaching is largely dedicated to the idea of training students to acquire a language of expertise employed in international legal organisations. Such training is causing the reproduction of a cultural hegemony in the classroom, in the law school, and society at large. In the following, I investigate whether there is a possibility (and an obligation) for teachers of international law to disrupt this reproduction, to be counter-hegemonic in their teaching. The term 'cultural hegemony' was coined by Antonio Gramsci to denote the actions of a ruling class which constructs particular cultural norms, sustaining and endorsing them as natural and inevitable, for the purposes of domination. There is an emphasis on ruling by consent rather than simply through force (Gramsci 1971/2007). Gramsci dedicated his writing, particularly in *The Prison Notebooks*, to exposing the accepted cultural norms as artificial social constructs, put into place and sustained through particular institutions, practices, and beliefs.² In Gramsci's view, education is central to understanding hegemony, signalling 'every relationship of "hegemony" is necessarily an educational relationship' (Gramsci 1971/2007, p. 350). Applying this analytical frame to the practices involved in teaching international law, the question is: Is the dominant form of practice-oriented international law teaching producing and reproducing the dominance of a particular class of lawyers who privilege individualism, the 'global North', males, whites, and an ideology of neoliberalism? And, is this cultural hegemony presented and perceived as natural and inevitable?

My own reflection on teaching international law from a critical angle was decidedly inspired by a teaching workshop I organized as part of the Critical Approaches to International Criminal Law conference in December 2012. In the modest

1 http://www.huffingtonpost.com/tucker-max/law-school_b_2713943.html, accessed 21 July 2013.

2 Michael A. Peters explains hegemony in Gramsci's sense as 'an essential part of the sociology of capitalist society enabling an understanding of the manufacture of consent by the powerful through the institution of cultural values' (Peters 2010, p. ix).

preparation for the workshop and during the course of the day, the question of the extent of the politics of teaching became increasingly prominent. The workshop, on the third day of a three-day conference, was organized for a group of like-minded lecturers in order to consider how to teach international criminal law (ICL) from a critical perspective. Like-minded here refers to a group of colleagues who are concerned with foregrounding issues of hegemony, inequality, power imbalances, biases, and limitations in and of international criminal law in their research. The discussion soon drifted towards the more general question of how to teach (law) in a critical fashion. Emotions ran high. It seemed to me, and troubled me, that a left critical agenda in research was apparently one matter, teaching in this vein to students was another. It surprised me how divisive the topic was. Some colleagues felt obligations and restrictions imposed through their institutions, others felt constrained by the expectations of students. One friend and colleague even provocatively said to me 'good luck with getting a promotion with that agenda'. I am, admittedly, as much implicated in the concern about institutional and academic restraints, and probably just as complicit in the reproduction of the existing unequal structures as the next person – but, I think that this should not spell defeat in terms of a critical, maybe even radical, outlook on teaching.

Apart from my own complicity, I should set out some further disclaimers: Although much of what is mentioned below could be equally valid in the context of school, even nursery school, education, I will largely draw on my experience in higher education. An additional disclaimer regards my inadequate expertise in pedagogy. Perhaps problematically, higher education teachers are not, or only in a very limited way, expected to engage with the science of learning theories and processes. In general, the expectation is that if you have researched in an area (or did well in that area in your own exams), you are also able to teach it. Researching even superficially on pedagogy has unveiled a rich tradition of thought and an enormous literature of which I have merely been able to reference small parts.

It should be noted from the outset that the audience I refer to here is not limited to teachers/lecturers/educators³ of law. When I speak to a 'we' in the following, so an audience to which I include myself, I mean all teachers *and* students of law, and in particular international law. Much can be said about teaching ICL from a critical perspective (about its focus on individual accountability, the simplified narratives of 'goodie' and 'baddie', the lack of political, religious, and social context, the North/South divide of responsibility, and so on), but, this contribution focuses on more general questions of pedagogy in higher education, teaching law, and particularly teaching international law.

In the following, I begin by setting out the stakes of the current trajectory of education as determined by neoliberal precepts. I then consider Duncan Kennedy's piece on 'Legal Education and the Reproduction of Hierarchy', placing it within today's higher education systems. From this emerges that (the majority of) Ken-

3 I use these terms interchangeably.

nedy's key concerns are still as salient today as they were 30 years ago. I then turn to international law by drawing on a piece by Anne Orford in which she interrogates the depoliticization of international lawyers, achieved through their *disciplining*. From these two sections I take that legal education in its focus on training is causing the cementing of an existing hegemony, meaning that the interests of the most powerful social groups are constantly reaffirmed (Mayo 2010, p. 22). My modest suggestion, which can only touch upon rudimentaries, is for a consideration of the German word *Bildung* in relation to teaching (international) law from a critical angle. *Bildung*, as opposed to training, encompasses a sense of activity rather than passivity; it includes the idea of reflexivity and critique. I suggest that this notion of *Bildung* may be a starting point for a counter-hegemonic approach to teaching law, and in particular international law.

1 The stakes

I would like to use some of the introductory space to set out what I think may be at stake if (international) (law) education continues along the current trajectories. We could imagine the international law classroom as existing within different spheres of influence. The sphere of the law school, the faculty, the university, the domestic state's educational system, the domestic state's larger political and ideological system, the regional (inter-national) education and political system, and then the global sphere. Each sphere influences the other and highlights different stakes. There are numerous issues which could be explored here; I want to highlight just one stake per sphere, conceding that they may overlap and are in part artificially segregated for the purpose of clarification and argument, and forewarning that these thoughts will be fleshed out more in the following sections.

Proceeding from the global to the local: future international lawyers who are taught today will enter international legal organizations, or other legal outfits (law firms, governments) with a certain influence and a particular notion of 'how the world works'. Teachers of international law students are teaching a global elite, a global class, which carries ideas of the law into their work and private lives. While already coming to university as fully-formed individuals with preferences, dislikes, and sympathies, they are unlikely to have formed a definitive idea of the law, and the law in society. Along the current trajectories, international law is taught as a set of norms which have universal currency and are there to reign in power-politics. This liberal notion of international law, while enchanting, is predicated on a number of assumptions which privilege individualism over more social ideas, the 'global North' over the 'global South', male over female, white over non-white, neoliberal over social ideology. In Gramsci's sense, an elite class of international lawyers has manipulated the system of values within international law in order to establish its own *Weltanschauung* as the dominant one. International lawyers of tomorrow sustain and reproduce the *status quo* by viewing this domination as natural and the paradigms as neutral and universal.⁴

4 This is in reference to Marx and Engels in *Die Deutsche Ideologie*.

On the regional level, the reproduction of historical biases is at stake, particularly so in Europe. The spheres of influence in international law, although arguably shifting from the previously *exclusive* eurocentric, is nevertheless unarguably originated and entrenched in eurocentric enlightenment ideas. The centres and clusters of international law teaching (London and other parts of England, the Netherlands, the East Coast of the US, Southern Germany, Melbourne and Sydney) are reproducing these eurocentric enlightenment ideas and presenting them as global.⁵

State politics is an important sphere of influence for students of international law since it is to a great extent state politics which determines the attitude to, or the culture of, education. Commitments to neoliberalism are becoming more evident in higher education – prompting a move away from education's former place in the public sphere. The political economy of education has become central. David Harvey's work on neoliberalism is instructive for pinning down some of its central themes. In particular, Harvey states that a cardinal feature of neoliberal thinking is 'the assumption that individual freedoms are guaranteed by freedom of the market and of trade' (Harvey 2007, p. 7).

Students are largely viewed as consumers; universities are viewed as competing in a global marketplace, with franchised universities becoming more common, particularly in the so-called emerging markets; education is being 'sold' as a financial investment in the future; universities are trying to meet customer demand by changing their syllabi and training foci. In the UK, the commitment to neoliberalism has become sharpened with the Conservative-Liberal Democrat coalition government. All in all, higher education has become commodified and marketized (Canaan & Shumar 2008). It appears that this is not only the case in the free-market centres of Europe and Northern America, but also 'the South' (Naidoo 2008; Amsler 2008; Mamdani 2007).

Neoliberalism has assumed world-wide scope. Harvey places the globalization of neoliberalism in the late 1970s, early 1980s, with Deng Xiaoping's liberalization policies in China, Paul Volcker's taking command of the US Federal Reserve, Margaret Thatcher's mandate to curb trade union power, and Ronald Reagan's political and economic endeavours (Harvey 2007, p. 1, 2). The reach of neoliberalism has sharpened further since the financial crisis and the consequent funding cuts across the public sector. Meanwhile, the limitations of free market capitalism have also become more evident, with Eurozone sovereign debt crises being a case in point. At stake in regard to universities is the understanding of the university as a place outside of a market logic, in which knowledge can be more than simply a means to acquiring particular skills for securing a particular profession.

Universities have political orientations too, some openly, some less openly. In the US, affiliations with certain traditions of thought, and certain attitudes towards

5 The recent so-called 'turn to history' in international law has sought to bring attention to such biases as well as challenge the accepted history of international law.

pedagogy, are perhaps most evident. In my experience, it is also possible to distinguish between more conservative and more liberal institutions in Europe. By conservative I mean an affinity with doctrine and sympathies with political (read governmental) actors; while being more liberal-minded denotes an affinity with rights-discourse and sympathies with individual (read non-governmental) actors. And, by this distinguisher, students in the Netherlands are more conservative than those in the UK and students in the South of England are more conservative than in the North. This can then, in a very generalized manner, be mapped onto the respective institutions whereby students at Leiden University are more conservative than students at the University of Liverpool. Within the UK, a distinguishing factor may be the designation of a university as Russell Group, i.e., an institution which foregrounds research,⁶ and non-Russell Group institutions, many of them the former polytechnics which often foreground (although not exclusively so) teaching and training (Freedman 2011, p. 1-2). The Russell Group was formed in 1994 as a response to the 1992 government policy to eliminate the binary divide between universities and polytechnics. Joyce E. Canaan argues that by once again distinguishing themselves from the rest, the Russell Group have re-stratified the seemingly levelled playing field (Canaan 2013, p. 25). Russell Group students tend to be the elite privately educated students, while non-Russell Group universities are largely attended by students from working class backgrounds. At the same time, needless to say, student groups are not homogenous. Yet, at stake in the contemporary trajectory of neoliberal universities is that there is no longer a space for universities committed to bridging social inequalities in a meaningful way.

The seemingly most significant influence of the attitude of law schools is in how far they are, or allow themselves to be, steered by the professions. This occurs through influences both on the law syllabus (which subjects are 'core' subjects) and in terms of requirements of employability skills. The more this is so, the more a tradition of training rather than teaching, of technical expertise rather than critical thought, is established. The stakes here will be further explored below, but they crucially include the understanding of law as a discipline which is socially relevant. Students come to law school to be trained, expecting the inculcation of a particular expertise; they largely do not come to law school to understand the underlying social structures of the law.

The final sphere of influence, the international law classroom, is directed primarily by the teacher and his or her pedagogy. Subject to further investigation below, international law lecturers are surrendering to the aforementioned spheres of influence and are furthering a cultural hegemony which is enabled through submission to a neoliberal market logic. Lecturers submit to this due to, first, their own education of international law, and, second, because they are disciplined to teach in this way. The disciplining of international lawyers relates to the combination of subjection to the discipline (Threadgold 1996), as well as a culture

6 <http://www.russellgroup.ac.uk/our-universities/>, accessed 21 July 2013.

of accountability imposed on them (Shore & Wright 2000, p. 57-89). The primary driving force of cultural hegemony is the teaching of (international) law, and its language, as a *technical* discipline. The understanding of international law's own hegemonic tendencies, as well as its possible counter-hegemonic properties, are therefore left underexplored.

In this diagnosis of the spheres of influence, knowledge is a means to a particular end, both from the perspective of the students (securing a job) as well as for the teacher (getting promotions). At the more complicated partly unconscious cultural level, the end is a reproduction of the existing power imbalances.

2 Teaching law

In 1982, Duncan Kennedy published 'Legal Education and the Reproduction of Hierarchy'. In this piece, Kennedy interrogates the US law school as a site in which hierarchies are both manifested and reproduced (Kennedy 1982, p. 591).

He begins with a description of a typical first-year law school experience. His examination spans the classroom experience ('the teachers are overwhelmingly white, male, and deadeningly straight and middle class in manner' (p. 593)), the pressures of performance ('performance is on one's mind, adrenalin flows, success has a nightly and daily meaning in terms of the material suggested' (ibid.)), and the intellectual experience. The intellectual experience includes the revelation that there is no purchase for left or even for committed liberal thinking: 'The basic experience is of double surrender: to a passivizing classroom experience and to a passive attitude toward the content of the legal system' (p. 594).

In his analysis, the thesis particularly stands out that much of this approach to law and legal teaching comes about through an artificial distinction between law and policy. Such a distinction lies at the intellectual core of the ideological content of legal education (p. 596). Lecturers teach law in a way which presumes that legal reasoning exists, moreover that it exists as a rational neutral practice, and that it is different from policy analysis. Policy analysis is the only outlet for uncovering indeterminacy and for biased decisions. Public policy is that which highlights the indeterminacy and manipulability of ideas and institutions central to liberalism (ibid.). Contract law, tort law, land law, criminal law, are all taught as though they had an inner logic. Kennedy highlights that these are not random subjects built on the foundation of neutral reasoning, but are 'the ground-rules of late nineteenth-century laissez-faire capitalism' (p. 597). The primacy of property and restrictions on interference with the market are foregrounded as central values. The relevant rights are those reflecting the interests of private property owners, businesses, multinational corporations and financial capital. Through the idea of the 'inner logic', law is bestowed with an almost magical, and certainly mysterious, authority. The authority of the law is mirrored by the authority of the lecturer who imparts knowledge on the basis that his or her authority is preserved. Students mimic such authority, both of the law and of the individual who has

the knowledge to impart the law. Ultimately, students learn to embody established hierarchies without questioning them.

Kennedy's description of a US law school in the 1980s is an equally accurate description of many law schools in the world today. Certainly, it seems particularly familiar to the law schools in the UK, where the three year law course is heavily influenced by the professions. The subjects required by the legal profession are compulsory subjects on the degree programme so that completion of the degree will also satisfy the requirements of the professional bodies. There is a tacit understanding of the distinction between 'hard' and 'soft' modules. The former include the core modules of contract law, tort law, criminal law, law of trusts, commercial law; the latter include modules such as family law, human rights law, legal theory. Soft subjects are often feminized and infantilized (Orford 1998, p. 18). Syllabi are increasingly skills-focused, emphasizing communication skills, team work and critical analysis.⁷ Notwithstanding the importance of such skills, understanding and analysing the role of law in society, even regarding law as a social language, have disappeared and have given way to the training of professionals who will fit in well with a market-focussed legal practice.⁸ As the epigraph provocatively states: law schools are in this sense trade schools.

It is worth noting the German law school as a possible counter-example. In Germany, the *Rechtswissenschaften*, legal science, is historically and at present less focused on professionalization, although it appears to be moving in the professionalization and training direction. The education sector at large is relevant: in Germany, students only pay a nominal administration fee per semester rather than the, to some extent, crippling fees in the UK and the US.⁹ While the first year of legal education will include contract law, it commonly also includes legal philosophy and Roman law. Rather than being viewed as the 'soft' subjects, these are incorporated into syllabi in the same rigorous way as, say, contract law or criminal law. As a result, the exams in those subjects are not set up to be easier as a mark of the lecturers' gratitude that students have picked their subject.

However, not all is rosy at German universities. An estimated 90 per cent of German law students complement their university studies with a private 'Repetitorium',¹⁰ a hand-full of companies in Germany who charge high fees for preparation for the notoriously difficult exams. They market themselves on the basis that

7 Critical analysis does not refer to an understanding of the underlying assumptions of the law or its place within society at large, rather it refers to the ability of students to make *pro* and *contra* arguments. Critical analysis encompasses the skill of identifying the conflicting principles – usually two or three (one conservative, one liberal, one in the middle). At the end, these conflicting principles are simply 'balanced away' (Kennedy 1970-1971, p. 84).

8 Campaign for the Public University at <http://publicuniversity.org.uk/>, accessed 21 July 2013.

9 Fees of around €1,000 per semester were introduced in most *Bundesländer* after 2005 (when the Federal Constitutional Court rescinded the ban on tuition fees). However, eight years later, these have largely been abandoned (www.timeshighereducation.co.uk/news/unbridled-success-germanys-fee-foes-claim-victory/2003928.article, accessed 21 July 2013).

10 www.juraindividuell.de/blog/notwendigkeit-juristischer-repetitorien/, accessed 21 July 2013.

university lectures emphasize academic research while the exams require skills for solving cases. To bridge this disjuncture, students pay around €2000 per year to learn how to solve cases in the exams.¹¹ And the exam results determine the job, and income.¹²

What the UK, the US and Germany certainly have in common is a largely decrepit left programme in the law schools. In 1982, Duncan Kennedy stated: 'Most liberal students believe that the left program can be reduced to guaranteeing people their rights, and to bringing about the triumph of human rights over mere property rights' (1982, p. 598). Kennedy observed this as worrying given that the rights discourse presupposes, or takes for granted, that the world is and should be divided between the public and the private. The state sector, the public, enforces rights; and the private world of 'civil society' is one in which atomized individuals pursue their diverse goals. The site of the political then exists exclusively in the public sphere. Individuals are distanced, even alienated, from this sphere. Relying purely on the language of rights possibly subjects the left to complicity in the construction of a distinction between law and politics; and with this, the seeming neutrality of the law. Kennedy's conclusion is that 'rights discourse is a trap' (ibid). Regardless of whether one agrees with his conclusions, the left programme as a meaningful alternative certainly is a neglected site.

3 Teaching international law

As with the distinction between law and policy in foundational law courses, a general public international law course teaches students that there is a distinction between law and politics. For example, the 2003 Iraq war is generally taught as the political manipulation which then led to the war being 'illegal'. The Bush Doctrine, which according to US reasoning extended the exception of self-defence to pre-emptive self-defence, is regarded as political manipulation of the law. Against this, international law is introduced as the voice of reason and neutrality which (more or less successfully) reigns in excesses of politics.

In such rhetoric, both the law and the student are depoliticized. Law is portrayed as the rational, neutral, voice. The complicity of law in its commitment to a particular liberal ideology is obscured. This in itself is a politically motivated move: the depoliticization of law is political.

Orford refers to this process as 'disciplining', drawing both on Michel Foucault's work of 'technologies of the self' and feminist theorist Terry Threadgold. Fou-

11 www.faz.net/aktuell/rhein-main/wirtschaft/repetitorien-fuer-jurastudenten-recht-verschlossen-1642387.html, accessed 21 July 2013.

12 Hemmer, the most popular *Repetitor* in Germany, markets its services with the promise of higher points in the exams. It claims that each point from seven onwards (18 are attainable, the average is around 6) means an extra €1,000 in salary per month (www.faz.net/aktuell/rhein-main/wirtschaft/repetitorien-fuer-jurastudenten-recht-verschlossen-1642387.html, accessed 21 July 2013).

cault's idea of technologies of the self is that the self exists as an effect of power relations, making individuals to 'subjects' (Foucault 1988). Threadgold's work highlights how the process of being trained in a discipline involves the belief, reproduction, guarding and passing on of the narratives at the heart of the discipline (Threadgold 1996, p. 281). Orford begins her analysis of 'disciplining' with legal education – as the primary site in which the self-image of international lawyers is produced (Orford 1998, p. 15). She is particularly interested in the writing, reading and performing of narratives of intervention by international lawyers. She singles out four aspects of intervention narratives which 'in particular shape the sense of self of international lawyers' (p. 5). First, *New world order professionals*, a role attributed to international lawyers which portrays them as managerialists, 'pragmatic, problem-solving professionals, striding the corridors of power and being involved in history-making events' (ibid). Second, *Agents of humanitarianism*, those international lawyers who are 'humanitarians, saving victims of oppression and human rights abuses' (p. 8). Third, *Gentle civilisers*, an image of 'international lawyers as humane, professional, elite advisers to real decision-makers' (p. 11). And fourth, *Men of action*, professionals who 'do something' in a difficult and torn world which requires decision-making, not dithering. In sum, 'international lawyers come to understand themselves as the embodiment of heroic internationalism, and of the values and myths that underlie international law' (p. 16). And who is this disciplined 'subject' of law according to Orford? 'The "subject" of law is an aggressive, capitalist, heterosexual, white man' (p. 17). In this disciplining and in this technology of the self, legal education is political; it is an exercise of reproduction of power relations, at the same time as being declared non-political. Such training, or disciplining, of both teacher and student reproduces the cultural hegemony in all above-mentioned spheres of influence.

Not all students buy into this depoliticization – the student 'body' is by no means homogenous and students are not to be understood as simply passive recipients. There are some who are suspicious of the role of the law. Yet, often, what they learn to do with this suspicion is to package it away into their private lives – it is seen as having no place in the professional, legal, sphere (Kennedy 1982, p. 608).¹³ So even those students who could have a potential political agenda, save this for a space outside of law.

Is it therefore the role of the educator to expose these politics and shift the (self-)understanding of the role of lawyers? The spheres of influence show that the problem is both systemic as well as lying at an individual level. We are working in a neoliberal world, which the education system is largely committed to; legal education will therefore privilege the cardinal features of neoliberalism: individualism, competition, growth, and an idea of the guaranteeing of freedom through free markets and trade. But there are also ways in which education

13 Kennedy already mentioned this in a piece he wrote as a student at Yale Law School: '[T]he division of life into hermetically sealed "private" (emotional) and "public" (effectiveness) compartments must lead to deformations in both areas.' (Kennedy 1970-1971, p. 77, 78).

should be able to extricate itself from such market logic and this is where, potentially, individual educators come into play.

4 Bildung

From the above, it emerges that the problem at the teaching level is one of focusing excessively on training students. Education is instrumentalized for the individual. Training is part of the reproduction of cultural hegemony since it does not encourage reflection. In subscribing to training our students, we are ultimately subscribing to a particular exercise of power: one that emanates from viewing students as consumers, in a university of political economy. We are furthering an individualized, rather than a social, idea of teaching, treating knowledge as a means to a particular individual end.

Let us begin where Kennedy begins: if the distinction between law and policy and between law and politics is at the heart of the ideology of teaching which reproduces such cultural hegemony, the first step to teaching from a critical angle would be to introduce ideas of indeterminacy, bias, and manipulability to the law.

This is not about indoctrination of radical thought. Crucially, one type of hegemony must not be substituted with another. There must be a process in which both educator and student participate, with flexibility as to their roles. 'Education', or even 'teaching' and 'training' are terms with limited potential in this regard since they imply a one-way relationship. That between The Educator, The Teacher, The Trainer and the object The Educated, The Taught, The Trained.

The German word, and notion of, *Bildung* is perhaps useful since it captures a wider notion of education. It is a word which implies activity rather than passivity. Dörpinghaus et al. (2012) note two interconnected attributes which are central to the understanding of *Bildung*: first, *Bildung* relates to a complex relationship of self, the other, and the world; second, it relates to critical reflexivity. By this they mean that the relationships of self, the other, and the world are no neutral formulae, that they are thought and language processes (reflexive) which are differentiated and questioned (critique). Their understanding of *Bildung* is a discourse, mediated through differentiation, thought, and language, of the individual with oneself, with others, and the world (Dörpinghaus et al. 2012, p. 10). Such an idea of *Bildung* can be attributed to Hegel who believed in an organic understanding of education (Hegel 1807/1977). Education according to Hegel is the developmental formation of an individuals' unique potential through participation in society. Norms, beliefs, and values, constantly growing, are reflected back through immanent critique and active reconstruction of such cultural norms, beliefs, and values, affecting others and their *Bildung* (Good 2006, p. xix). *Bildung*, then, is to be understood as a social activity.¹⁴

14 See also Gramsci 'On Education' in *Selections from the Prison Notebooks*, who claims that the aim should be to 'insert young men and women into social activity' (Gramsci 1971/2007, p. 29).

However, some caution is also necessary. The etymology of the word, according to Schilling, reveals that *Bildung* derives from *Bildnis* which can best be translated as 'image' or 'effigy'. *Bildung* has, so Schilling, theological roots in that it was first conceived of as 'living in the image of God', *zum Ebenbilde Gottes* (Schilling 1961). With this in mind, *Bildung* concerns not only the relationship of an individual towards knowledge and society, but a relationship towards God, an entity embodying universal knowledge – a strict and unbreachable hierarchy is implied. Since secular displacements of God nearly always mean re-entrenchments of hierarchies elsewhere, *Bildung* must, if it is to serve as a useful interpretative tool, be dislodged from a sense of hierarchy, certainly from an idea of a locus of universal knowledge. Yet, how to address the inherent hierarchy of teacher to student?

John Dewey's work may provide some rudimentary points of departure. Dewey, often referred to as a scholar of the philosophy of education (Garrison, Neubert & Reich 2012), was particularly critical of the idea of vocational education as job training (Dewey 1915, 411f). He was wary of the instrumentalism of knowledge, suggesting that this fostered an alienation from larger societal issues. According to Dewey, learning was an intensely social process, and it was paramount for him to put that into practice.¹⁵ In 1896, Dewey and his wife set up a school, the University Elementary School, in Chicago which foregrounded learning through experience. The aim was to discover 'how a school could become a cooperative community'. Children learn through experimenting in a learning environment composed of materials, workshops, library and school gardens; they learn about themselves cooperating in and with their environment. The teacher was not viewed in the role of the domineering instructor, but rather as a co-worker. This is not to say law schools should follow the Dewey model, but it highlights that the displacement of the hierarchy can and has been achieved in other stages of education. It is also an instructive example of the relationship between practice and theory in critique, in that critique is not merely to be implemented through theory.

A further concern about *Bildung* is that it can be used as a class differentiator rather than an equalizer. Particularly in Germany, this is (historically) the case. Writing in 1885, Friedrich Paulsen stated:

'Formerly, one distinguished between aristocratic and middle-class bourgeois (*bürgerlich*), between believers and non-believers, between Catholics and Protestants, Christians and Jews. There are still memories present of these, but the practically important, the significant distinction is between *Gebildeten* and *Ungebildeten*' (Paulsen 1885, p. 658; my translation).

The passage is a reference to the new class of European professionals (professors, teachers, doctors, lawyers, merchants, musicians) which first appeared in the eighteenth century. In Germany, this class was, and often still is, referred to as the *Bildungsbürgertum*, the *Bildungs*-(middle-bourgeois) class. At the time of the

15 www.ucls.uchicago.edu/data/files/gallery/HistoryBookDownloadsGallery/chapter1_3.pdf, accessed 21 July 2013.

beginning of the industrial revolution, the *Bildungsbürgertum* was distinguished from the *Wirtschaftsbürgertum*, the economic middle-bourgeois class. Although the idea of social mobility through education is at the heart of this class, again, caution must be taken that *Bildung* does not simply become a new site of reproducing hierarchies. In this context it is noteworthy that Paulsen's ultimate aim was arguably to foster an ideal which was to serve the nation state, the German state as the superior state.¹⁶

How can a counter-hegemonic approach through *Bildung* be translated into higher education? Kennedy's strategy, provoking thoughts of a *Bildungsbürgertum*, is for 'building a left bourgeois intelligentsia that might one day join together with a mass movement for the radical transformation of American society' (Kennedy 1982, p. 610). Canaan has highlighted the importance of critical pedagogy, outlining the understandings of the Critical Pedagogy Collective (Canaan 2013, p. 34-44). Drawing on Freire (and reminiscent of Dewey), Canaan notes that the assumption of critical pedagogy is that of the students as 'knowers guiding teaching' (p. 36). Students and teachers are 'co-investigators in dialogue' (Freire 1970/2005, p. 62).

There is something distinctly appealing about such an idea of *Bildung* – it is a social as well as political idea of *Bildung*. Harmut von Hentig wrote a notable essay in 1996 in which he places *Bildung* in the context of politics from antiquity (von Hentig 2009, p. 205-210). Von Hentig explains that a privileged education brought with it a responsibility to engage in the Greek polis as well as in the Roman *res publica*. As Dörpinghaus et al. comment, such an approach to *Bildung* may appear alien to us: in today's world, we have replaced social engagement and common responsibility with our individual needs and our 'self' (Dörpinghaus et al. 2012, p. 39). For such an idea of *Bildung* to take hold, we must aim to rethink the deeply entrenched (liberal) notions of individualism.

Although it would be subscribing to a myth to claim that intellectuals (students and educators) are independent of class (Gramsci 1971/2007, p. 1-23), a notion of *Bildung* at least enables flexibility within this class, makes it more sensitized to the inequalities it creates and reproduces. A further myth is that there is no element of training in *Bildung*. It would be erroneous to claim that they are polar opposites; rather, *Bildung* complements training. Gramsci warned against an excessive emphasis on the distinction between 'instruction' and 'education', which can be mapped onto 'training' and '*Bildung*' respectively: 'For instruction to be wholly distinct from education, the pupil would have to be pure passivity, a "mechanical receiver" of abstract notions – which is absurd' (p. 36).

Students come with a certain 'baggage', as Gramsci calls it, of previous education acquired, but also crucially from the sector of civil society in which they participate, within the social relations of their family, neighbourhood. And it is this

16 <http://politische-bildung-sh.de/friedrich-paulsen/>, accessed 21 July 2013.

'baggage' which needs to be brought to the fore (not repressed) in the engagement with self, the other, and the world.

Translating a political, social, organic notion of *Bildung* to the law classroom involves, above all, the contextualization of norms. In ICL, for example, a deep interrogation of the principle of individual accountability would be required: What are the historical, religious, ideological, and political reasons for foregrounding the responsibility of those individuals? Could the focus on individual accountability be having wider social and societal impacts? Such a study would require the incorporation of anthropology, criminology, sociology, perhaps psychology – disciplines which work with empirical research methods. This would mean a displacement of the law as neutral and objective, demonstrating that law is shaped by considerations other than rationality and logic. Perhaps such contextualization could be central for a counter-hegemonic culture of international law teaching.

5 Constraints on educators

The constraints on educators in regard to counter-hegemonic teaching are wide-ranging, although not so wide-ranging to justify complete inability to act/resist. First, the constraints come from the above-mentioned spheres of influence. As Gramsci wrote in his essay 'On Education': 'The problem was not one of model curricula but of men, and not just of the men who are actually teachers themselves but of the entire social complex which they express' (Gramsci 1971/2007, p. 26).

Given the neoliberal commitments of higher education, in how far can an educator make an argument if it is at logger-heads with such a commitment? Will they lose their jobs? Their influence? Their gravitas? In the following, I have singled out institutional restraints (which stand alongside historical, social and societal restraints) as that which may be felt with the most intensity. Student surveys on teaching performance, university league tables, decisions on promotions, are all means by which the notorious 'academic freedom' may at times appear farcical. In 2000, Cris Shore and Susan Wright named the audit culture in higher education 'coercive accountability' (Shore and Wright 2000). They argued that processes of auditing have been transferred from the financial domain to the public sector. This includes the incorporation of terms of the new managerialism, a vocabulary of audit, such as 'performance', 'quality assurance', 'quality control', 'accountability' etc. (p. 60).

The most pressing question in regard to ensuring the 'quality control' of teaching through student surveys and peer-review relates to the teaching of doctrine. Does teaching in a critical manner allow for the teaching of doctrine? Teaching in a critical manner can be approached from one of two ways. One approach is to teach the doctrine and then 'slip in the theory'. Kennedy suggests that politicizing the classroom must begin with black letter law: 'I see myself as having a major res-

pensibility to teach doctrine' (Kennedy 1994-1995, p. 81). He fears otherwise that he may 'lose the students'. Annelise Riles has written about teaching property law from the perspective of an anthropologist, viewing the relevant case as a cultural text to be interpreted discursively for their cultural meanings (Riles 2004, p. 779). She attempted to teach a case by unpacking wider political and cultural issues, but soon sensed her control over the classroom slipping away (p. 780). On asking a colleague, he advised to 'slip the theory in'; students would not accept a 'theoretical orientation' (ibid). She learns that 'it was doctrine that needed to emerge from the cases, not relations of ownership and their meanings' (p. 782).

This sounds painfully familiar. In relation to international law, such 'slipping in of the theory' can be demonstrated by the teaching of the principle of non-intervention as one of the central tenets in the United Nations Charter (UNC). The doctrine is that there is a prohibition of the use of force, Art. 2 (4) UNC, to which there are two exceptions, provided in Art. 51 UNC (self-defence and UN Security Council resolution). One might then interrogate why the Iraq war from 2003 was regarded as 'illegal' under international law. For this, one would examine self-defence in more detail: Must an attack already have occurred? What has the International Court of Justice stated in this regard? What was previous practice of States prior to 2003? What do international law scholars think? How does the principle of sovereignty come into this? In expounding on sovereignty, one might state that the US has assumed a hegemonic position, allowing it to act despite the action being 'illegal'. There, hegemony was slipped in. Firstly, this presents the complex issue of hegemony in a very simplistic, thin, way. Indeed, hegemony is arguably equated with realism. Often, in teaching principles of international law (and I have certainly been guilty of this), the lecturer will oscillate between legalism and realism. The rule will be presented (legalism) and then the relevant power relations will be opposed to this (realism). International law states that the use of force in Iraq was prohibited; yet, the US acted out of military and economic reasons. Theory is reduced to crude categorizations, and rather than creating a more nuanced idea, one has prompted an even larger distance between the academic observer (student/teacher) and the event. A further problem with this approach is that before slipping in the theory, one has already presented the doctrine (the law) as opposed to politics; law has taken on a neutral voice of reason. In addition, this slipping in of the theory happens, in essence, in every classroom. When presenting this paper at a staff seminar at the University of Liverpool, all lecturers (also the more conservative ones) stated that they work in this way. 'The anarchist intervenes in the most conventional of forms', stated Peter Goodrich, commenting on Duncan Kennedy's choice of publishing his book on *Critique* with Harvard University Press (Goodrich 2001, p. 979).

Case studies may provide an alternative approach. Gerry Simpson has previously advocated for teaching with case studies, expounding on the importance of navigating between too broad a 'theory of everything' and the narrow legalistic focus which will 'founder on a lack of explanatory power': 'The solution lies in a severe,

probably traumatic, narrowing of focus followed by a broadening of perspective' (Simpson 1999, p. 89). An examination of the Iraq war may therefore start with the relevant historical, political, and religious background. The teacher may invite students to understand the narratives around the conflict, with the international legal narrative being one of them.¹⁷ This could prevent assumptions about neutrality of the law from being formed. But theory is not, of course, the only means of critique. In order for a counter-hegemonic *Bildungs*-culture to take hold, one could introduce a form of student-led teaching, changes to the physical setting of the classroom, alternative uses of a normative language, and methods for taking action against oppression. All these suggestions require much more in-depth investigation, for which space (and possibly imagination) are lacking here.

Conclusion

In 1982, Duncan Kennedy wrote about the reproduction of hierarchy within law schools. In 2013, law schools are still institutions in which the present order, its biases and limitations, are reproduced. They privilege the understanding of norms as neutral over political and indeterminate understandings; the 'global North' over the 'global South'; men over women; heterosexual over homosexual; white over non-white. Yet, despite this grim diagnosis, Kennedy ends on a positive note, a suggestion for restructuring (Kennedy 1982, p. 610f).

My optimistic note relates to the idea of *Bildung* as a form of emancipation; a counter-hegemonic idea with which to resist the current neoliberal trajectory of higher education. Bertold Brecht's poem 'In Praise of Learning' signals the potential for emancipation through learning particularly powerfully.

Learn, man in the asylum!
Learn, man in prison!
Learn, woman in the kitchen!
Learn, sixty-year-old!
You must take the lead.
Find a school, homeless person!
Acquire knowledge, you who are freezing!
You who are hungry, grab for a book: It is a weapon.
You must take the lead.¹⁸

The poem is addressed to the weak in society, those who are disadvantaged. Each paragraph ends on 'You must take the lead'. Notably, this poem was regarded as so radical in the post-war United States, that it was the central piece Brecht was

17 I have attempted this in designing a module for undergraduate students at Liverpool Law School titled 'Public International Law in Current Affairs' (http://www.liv.ac.uk/info/portal/pls/portal30/tulwwwmerge.mergepage?p_template=m_lw&p_tulipproc=moddets&p_params=%3Fp_module_id%3D46928, accessed 21 July 2013).

18 This is an excerpt from the poem in Brecht 1932/2011. My own translation.

questioned on by the 'House of Un-American Activities Committee'.¹⁹ In 1947, Brecht's anti-Nazi activities (which he had previously been celebrated for) looked to the Americans to be communist and revolutionary activities. Such suspicion illustrates particularly well how the neoliberal system is opposed to empowering those who are disempowered. Law schools should sit at the centre of empowerment of the disenfranchised rather than reproduce disempowerment of the weak. And, in the end, this is arguably the message educators want their students to take away with them. Orford has summarized this in regard to international law as educating 'ethically aware global citizens' (Orford 1995, p. 251).

Knowledge is not only a tool, or a weapon, for successfully attaining a profession. And *Bildung* is not merely a technique by which to impart knowledge. On the one hand, one may take from this that knowledge is not just about instrumentalism; however, I think the message is that knowledge is not about instrumentalism in a narrow sense, simply concerning the possibilities of the individual. Knowledge can also be instrumental in a wider sense, concerning the possibilities of addressing pressing concerns of society at large.

My final paragraph shall be dedicated to an anecdote from my own teaching – a moment which I found heartening and encouraging. At the beginning of my Critical Approaches to International Criminal Law class, I set out some of the themes we would be investigating in the course of the term. I listed issues of 'ICL and gender', 'ICL and neoliberalism', 'ICL and justice', 'ICL and utopia', and 'ICL and hegemony'. I said a few sentences about each issue. I then asked the students to tell me what it was that they were hoping to get out of the course. One student, a charming 78-year-old, a self-proclaimed conservative, with equally self-proclaimed right-wing tendencies, who was born into a self-identity of the 'greatness' of the UK, and had previously worked in law enforcement with the Greater Manchester Police said: 'I'd like to learn what hegemony means.'

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SAMENVATTINGEN

Skeptical Legal Education

Bart van Klink & Bald de Vries

Law teachers at the university want students to develop a critical attitude. But what exactly does it mean to be critical and why is it important to be critical? How can a critical attitude be promoted? In this article we intend to elucidate the role that critical thinking may play in legal education. We will introduce the idea of skeptical legal education, which is to a large extent based on Michael Oakeshott's understanding of liberal learning but which relativizes its insistence on the non-instrumentality of learning and reinforces its critical potential. Subsequently, the article presents a teaching experiment, where students, based on self-organization, study and discuss basic texts in order to encourage critical thinking.

Legal Dogmatics and Academic Education

Jan Struiksmā

Previously a model was developed whereby the evolution of dogmatic legal theory design can be made more explicit. This concerns, amongst other aspects, the application of the empirical cycle constructed by De Groot, which forms the final element of an evolution of the application of mundane knowledge to theory design. The starting point of this article is that this evolution must be 'repeated' during an academic study in empirical subjects. The objective is to investigate how this is done in the legal dogmatic education.

Alternative Methodologies: Learning Critique as a Skill

Bal Sokhi-Bulley

How can we teach critical legal education? The article tackles this key question by focusing on the role of methodology in legal education and research. I argue that critical legal education requires marketing methodology as a 'skill', thereby freeing it from what students and researchers in Law often view as the negative connotations of

'theory'. This skill requires exploring 'alternative methodologies' – those critical perspectives that depart from legal positivism and which Law traditionally regards as 'peripheral'. As an example, the article explores the Foucauldian concept of governmentality as a useful methodological tool. The article also discusses the difference between theory, methodology and method, and reviews current academic contributions on law and method(ology). Ultimately, it suggests a need for a 'revolt of conduct' in legal education. Perhaps then we might hope for students that are not docile and disengaged (despite being successful lawyers) but, rather, able to nurture an attitude that allows for 'thinking' (law) critically.

Empirical Facts: A Rationale for Expanding Lawyers' Methodological Expertise

Terry Hutchinson

This article examines the importance of the social evidence base in relation to the development of the law. It argues that there is a need for those lawyers who play a part in law reform (legislators and those involved in the law reform process) and for those who play a part in formulating policy-based common law rules (judges and practitioners) to know more about how facts are established in the social sciences. It argues that lawyers need sufficient knowledge and skills in order to be able to critically assess the facts and evidence base when examining new legislation and also when preparing, arguing and determining the outcomes of legal disputes. For this reason the article argues that lawyers need enhanced training in empirical methodologies in order to function effectively in modern legal contexts.

'I'd like to learn what hegemony means'

Christine E.J. Schwöbel-Patel

This contribution explores the possibility of teaching international law in a critical fashion. I examine whether the training

which is taking place at law schools is establishing and sustaining a cultural hegemony (a term borrowed from Antonio Gramsci). I ask whether the current focus on technical practice-oriented teaching is a condition which should be questioned, even disrupted? In my thoughts on reorientations of this culture, a central term is the German word *Bildung*. *Bildung* refers to knowledge and education as an end in itself (John Dewey) as well as an organic process (Hegel), and therefore incorporates a wider understanding than the English word 'education'. In terms of international law, a notion of *Bildung* allows us to acknowledge the political nature of the discipline; it may even allow us to 'politicize' our students.

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De relatiecrisis tussen politiek en rechtspraak

Scheidende machten



Marc Hertogh

Er is iets geknakt in de relatie tussen politici en rechters in ons land. In plaats van een solide stelsel van machtscheiding, lijken beide partijen eerder verwickeld in een pijnlijke vechtscheiding.

Hoe kan het dat de relatie tussen politiek en rechtspraak zo is bekoeld? Waarom staat de verhouding tussen politiek en rechtspraak, die ooit was gebaseerd op onderling vertrouwen, in het teken van groeiend wantrouwen? En welke rol spelen Twitter en andere media in de gespannen verhouding tussen politiek en rechtspraak?

Marc Hertogh nam als 'Nieuwspoortrapporteur' een kijkje in de wereld van politiek en rechtspraak en sprak uitgebreid met zowel politici als rechters.

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